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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.* †

HON. JOSEPH A. S. MITCHELL. ‡

HON. JOHN G. BERKSHIRE. §

HON. WALTER OLDS. §

HON. SILAS D. COFFEY. §

* Chief Justice at the November Term, 1888.

† Term of office commenced January 3d, 1887.

‡ Term of office commenced January 6th, 1885.

§ Term of office commenced January 7th, 1889.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
CHARLES E. COX.

C A S E S
ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, NOVEMBER TERM, 1888, IN THE SEVENTY-
 THIRD YEAR OF THE STATE.

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143	576

No. 13,653.

MCADAMS v. LOTTON.

REAL ESTATE.—*Action to Recover.*—*Disclaimer.*—*Effect of.*—*Demurrer.*—Under section 1072, R. S. 1881, a disclaimer by the defendant will not bar an action to recover possession of real estate, nor defeat the plaintiff's right to actual damages; but as the disclaimer is a confession, and its office to save costs accruing subsequent to the judgment, a demurrer to it will not lie.

SAME.—*Costs.*—If, in such a case, the defendant, in defiance of the judgment and in opposition to his disclaimer, refuses to yield possession and thus compels the plaintiff to take out a writ of ouster, he becomes liable for all costs.

From the Ohio Circuit Court.

J. B. Coles, for appellant.

S. H. Stewart, for appellee.

ELLIOTT, C. J.—The appellant alleges in his complaint that he is the owner in fee of the land in controversy; that the defendant wrongfully and unlawfully withholds possession, to the appellant's damage in the sum of one hundred

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dollars. The appellee's answer, omitting the formal parts, is in these words: "The defendant disclaims any interest in the land of the plaintiff as described in his complaint." To this answer the appellant unsuccessfully demurred.

The answer is a disclaimer. It does not, however, do more than disclaim a present interest, for it does not assert that at the time the action was brought the defendant was not claiming an interest in the land. It limits the disclaimer to the time of interposing the defence. It does not deny the allegation of the complaint that the defendant wrongfully withholds possession, nor does it deny that this wrongful act caused the plaintiff damages. It does not admit the amount of damages, for amounts are not confessed by a failure to deny them; but it does admit that there is a right to some compensation for the wrong. The answer before us does not extend beyond the beginning of the action, for it concedes that there was a cause of action, since nothing is averred that shows that there was not a right to bring the action. We are not, therefore, dealing with an answer in the form of a disclaimer which shows that before action brought the defendant disclaimed title. It is, however, not easy to perceive, as will appear from what we shall say further on, how any disclaimer can be good as a plea in bar against a complaint averring that the defendant unlawfully withholds possession and showing a right to damages.

It is held in *Noe v. Card*, 14 Cal. 576 (609), that a disclaimer is not a proper pleading in an action of ejectment, and there seems to be a reasonable foundation for this doctrine. But the appellee builds upon section 1072, R. S. 1881, and insists that it makes a disclaimer proper in actions to recover real estate. This section, however, in terms refers to actions for partition and to actions to quiet title. In *Ragan v. Haynes*, 10 Ind. 348, it is expressly decided that it does not refer to actions to recover possession of real estate, for the section there referred to as section 613, is the same as section 1072 of the present code. The same rule was asserted in

McAdams v. Lotton.

Hill v. Forkner, 76 Ind. 115, and applied to a case very like the present. It is true that in *McCarnan v. Cochran*, 57 Ind. 166, an answer in an action of ejectment was said to be in the nature of a disclaimer, and the section of the code we have mentioned was referred to as governing the case; but that answer was very different from that now before us, and the remark of the court was a merely incidental one. At common law a disclaimer in an action of ejectment was held proper by some of the courts, and it was also held to be a plea in confession, and precluded the further prosecution of the case at the costs of the defendant. *Greeley v. Thomas*, 56 Pa. St. 35; *Killen v. Compton*, 60 Ga. 116. But it is not easy to perceive how this can be entirely correct even where the common law prevails, for if the defendant is unlawfully in possession his disclaimer can not be justly held to deprive the plaintiff of a right to a judgment for possession. If a disclaimer can have this effect, then a defendant may keep the plaintiff out of possession until after the action is brought, defeat his action by a disclaimer, and compel him to pay the costs of vindicating a clear legal right. No principle of equity or justice sustains such a doctrine. If a plaintiff has a right to relief, when he brings his action, he has a right to a judgment awarding him that relief. If it is his right to have relief, he can not be made to pay the costs of securing it. But, however it may be at common law, it is clear that, under our statute, a disclaimer can not bar a plaintiff's right to a judgment. This we say for the reason that, under our statute, a plaintiff is entitled to judgment for possession and for actual damages, while at common law a plaintiff in ejectment could only recover nominal damages. *Dobbins v. Baker*, 80 Ind. 52; *Hays v. Wilstach*, 82 Ind. 13; *Hill v. Forkner*, *supra*.

The statutory rule is a just one, for if a plaintiff has been kept out of possession of his property, and another has reaped benefit and profit from the possession, he should account to the plaintiff. Nor is there any necessity for two actions, for

McAdams v. Lotton.

the whole right may properly be redressed in one. *Boyd v. Cowan*, 4 Dallas, 138. But the rule is a statutory one, and needs no defence. As the law gives the plaintiff a right to damages, the defendant can not, it is perfectly clear, defeat that right. We conclude that a disclaimer does not bar the action nor defeat the right to damages.

It does not follow from the conclusion we have affirmed that the trial court erred in overruling the demurrer to the answer. The reason for this proposition is, that a disclaimer is a confession of the cause of action, and operates to preclude the plaintiff from prosecuting his case beyond a judgment awarding him possession and damages. *Greeley v. Thomas, supra*; *Killen v. Compton, supra*. It confesses that the plaintiff is entitled to that relief, and although it must follow from this that he is entitled to a judgment awarding him that relief at the costs of the defendant, still it does not necessarily follow that a disclaimer is bad on demurrer.

A disclaimer is essentially a confession, and this it purports to be. Its office is not to bar the action, but to save costs which accrue after the entry of a proper judgment embodying the relief the law awards the plaintiff. As it is all it professes to be, a demurrer will not lie. It only asks relief from costs subsequent to the judgment, and this it is sufficient to secure. If it is sufficient for the purpose for which it is pleaded, it can not be condemned. If, however, the defendant should, in defiance of the judgment, and in opposition to his disclaimer, refuse to yield possession, and thus compel the plaintiff to take out a writ of ouster, he would undoubtedly burden himself with all costs.

We hold that the court did not err in overruling the demurrer to the answer, but we also hold that it did err in refusing to permit the appellee to prove his damages, and in taxing him with costs. It was the duty of the court to hear evidence upon the question of damages, and to assess the damages actually sustained. *Hill v. Forkner, supra*. Involved in the right to prove damages is the right to prove all the

The Chicago and Eastern Illinois Railway Company v. Hedges, Adm'r.

facts essential to a foundation for the assessment of damages. It was also the duty of the court to give the plaintiff judgment for the damages proved and for possession, together with costs.

Judgment reversed.

Filed March 13, 1889.

No. 13,624.

THE CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY
v. HEDGES, ADMINISTRATRIX.

NEGLIGENCE.—When Actionable.—A recovery can not be had for an injury which is the result of the joint or concurring negligence of both parties to the transaction. To charge the defendant with liability, the plaintiff must show that the injury was caused solely by the negligence of the defendant, or of persons for whose acts he is responsible.

RAILROAD.—Crossing.—Drifting Train.—Negligence.—Injury to Footman.—

Although a railroad company may be negligent in detaching an engine from the cars composing the train, and, by increasing its speed, widely separating it from the cars, which are allowed to run over a highway or street crossing without means of giving the statutory warning, yet if a pedestrian, who is familiar with the crossing and the habit of the company to so detach the engine, is run over and killed by the drifting train, in the daytime, when by looking or by heeding outcries he could have avoided injury, an action for damages will not lie.

SAME.—Presumption of Negligence of Traveller.—Where it is found that the person killed could, by looking, have seen the approaching train in time to have avoided injury, and that there was nothing to prevent him, before reaching the track, from seeing the train when it was two hundred feet from the crossing, it will be presumed that he either did not look or that he deliberately took the risk of attempting to cross, notwithstanding the danger.

SPECIAL VERDICT.—When Judgment Must be Rendered Upon.—Where it appears by the answers of the jury to interrogatories that the facts, or

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118	310
118	5
124	289
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131	40
118	5
136	259
118	5
142	275
143	365
143	453
118	5
149	67
118	5
158	495
158	496
158	499
118	5
162	378
162	447
118	5
170	30
118	5
171	172

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some of them, essential to support the general verdict are in irreconcilable conflict with such verdict, the court must accept as true the facts specially found and render judgment accordingly.

From the Fountain Circuit Court.

T. F. Davidson and *W. Armstrong*, for appellant.

L. Nebeker and *H. H. Dochterman*, for appellee.

MITCHELL, J.—This action was brought by Maria Hedges, administratrix of the estate of Daniel T. Hedges, deceased, against the appellant railroad company, to recover damages alleged to have resulted to the widow and children of the intestate on account of the death of the latter, which it is charged was caused by the wrongful acts and omissions of the defendant.

The particular wrong charged in the complaint is, that on a certain date, as one of the defendant's trains approached the town of Covington, the servants of the defendant having the train in charge, carelessly and negligently detached the engine from the cars; that the engine was run with accelerated speed to a water-tank about fifty yards west of the depot, leaving the cars to follow of their own momentum down a descending grade to the depot. It is charged that the train of cars thus following passed over a highway which crosses the railway track near the depot, and that the defendant's servants negligently omitted to give any signals by ringing the bell, sounding the whistle, or otherwise, of the approach of the cars, from which the engine had been thus detached, and that in consequence of such neglect the intestate, being unaware of their approach, attempted to pass over the highway crossing, and was run against and over, the result being that his death was caused without any fault on his part.

The jury returned a general verdict in favor of the plaintiff, and in answer to interrogatories propounded they returned the following facts specially: The decedent had been familiar with the crossing for ten years, and for two or three

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months before his death his business had taken him to the depot, about the same hour that he was killed, on each week day. He was on foot, and was on his way to the depot at the time he was struck by the train, which arrived at Covington on its schedule time. The train approached from the east, while the decedent was passing southwardly along the highway toward the depot. There were two side-tracks, lying north of the main track upon which the train was approaching, the one lying nearest the main track being nine feet distant therefrom. Having thus summarized the facts specially returned in answer to the first eighteen interrogatories, we set out the following questions, together with the answers of the jury, in full:

“19. How far east along the main track could the deceased have seen had he looked when he reached the south rail of the south side-track? About two hundred feet.

“22. Had it been the habit of those in charge of the train, for two or three months before the injury, to detach the engine and run it to the water-tank, as was done on the day of the injury? Yes.

“23. Did the accident happen in the daytime? Yes.

“24. Could the deceased, if he had looked in the direction of the approaching train, have seen it when he was on the south side-track? Yes.

“25. Could the deceased have seen the train, if he had looked, in time to have avoided the injury? Yes.

“27. Did the train conductor stand on the depot platform and shout a warning to the deceased? Yes.

“32. Was there a brakeman on the car next to the forward car of the train? Between the second and third cars.

“33. Did this brakeman shout a warning to the deceased while deceased was on the south side-track? Yes.

“35. Were the brakes on the front car set against the wheels from the time the engine was detached until the deceased was struck? Yes.

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"38. At what rate of speed was the train approaching the crossing? About four miles an hour."

Other answers returned by the jury show that the decedent approached the crossing with his head down; that he was probably giving attention to the engine, which had passed some minutes in advance of the train from which it had been detached, and which was at the water-tank some 240 feet west of the crossing. The fifty-fifth question and answer were as follows:

"What was there to prevent the deceased from seeing the approaching train when he had reached the south rail of the south side-track? Nothing."

There were other answers, but none which in any way qualified or mitigated the force of those above set out.

The only question we deem it necessary to consider is, whether or not the court ruled correctly in overruling the defendant's motion for judgment on the special findings of the jury, notwithstanding the general verdict.

We quite agree with all that is said in support of the ruling below, concerning the scope and effect of the general verdict, and the necessity that there should be an irreconcilable conflict between it and the facts specially found, before the latter will prevail over the former. The general verdict must be regarded in the first instance as affirming the truth of each and every proposition or fact necessary to support the general conclusion arrived at, and every reasonable presumption will be indulged in its favor, while nothing will be inferred or presumed in aid of the special findings as against the general verdict. *McComas v. Haas*, 107 Ind. 512, and cases cited; *Rice v. Manford*, 110 Ind. 596.

When the jury are required by direct and unambiguous questions to return answers pertinent to the particular facts in issue, each answer, unless it is clearly inconsistent with some other relating to the same subject, is to be regarded as stating the exact truth in respect to the particular fact or proposition embraced by the question; and where it appears

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by the answers, construed together, that the facts, or some one of them, essential to support the general verdict, are directly inconsistent, and in irreconcilable conflict with the general verdict, it becomes the plain duty of the court to accept the facts specially found as true, and to render judgment accordingly. *Frank v. Grimes*, 105 Ind. 346; *Cox v. Ratcliffe*, 105 Ind. 374.

It has often been decided that in actions such as this the burden of proof lies entirely on the plaintiff. Two propositions, one affirmative, and the other in a sense negative, must be established by him. It is for the plaintiff to show, either directly or by the facts and circumstances surrounding the occurrence, that the accident which caused the death of the intestate happened through or on account of the negligence of those for whose acts the railroad company was responsible, and that the injury resulted solely from their negligence, to the extent, at least, that the intestate was not himself guilty of any negligence which directly contributed to the result. *Tolman v. Syracuse, etc., R. R. Co.*, 98 N. Y. 198. If the injury resulted from the joint or concurring negligence of both parties to the transaction, it was not, in legal contemplation, the negligence of the railroad company which caused it, and the plaintiff must fail. *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279, and cases cited; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1; *Davey v. London, etc., R. W. Co.*, 37 Eng. Rep. (Cook's notes) 606.

Conceding, as we do, that the jury might well have found that the railroad company was negligent in detaching the engine from the cars, and in increasing its speed so as to let the train drift over a highway or street crossing without any sufficient means of giving the statutory warnings—*Pennsylvania Co. v. State*, 61 Md. 108—it nevertheless appears from the facts specially found that the plaintiff's intestate, who approached the main track on foot, could have seen the approaching cars if he had looked when at a distance of nine

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feet from the main track, and that there was nothing to prevent him from seeing but his failure to look.

It is not only a settled rule of law, but it is one of the plainest dictates of ordinary prudence, that one about to go upon or across a railroad track must use the means available to him for the purpose of ascertaining whether he may do so in safety; and it is as well settled as anything can be, that unless the conduct of the railroad company was such as to mislead or prevent a person about to go upon the track from looking, or to throw him off his guard by inducing him, by some affirmative act, to believe that he can cross in safety without observing such precautions, his failure to look or listen will be regarded as negligence *per se*. "No one can be said to be in the exercise of due care who places himself upon a railroad track without the assurance from actual observation that there is no approaching train." *Gaynor v. Old Colony, etc., R. W. Co.*, 100 Mass. 208. "A railroad crossing is a place of peril, and common prudence requires that a traveller on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless." *Allyn v. Boston, etc., R. R. Co.*, 105 Mass. 77. One thus entering upon a railroad track can not recover for a resulting injury, even though the company may have neglected its duty also. *Tully v. Fitchburg R. R. Co.*, 134 Mass. 499; *Butterfield v. Western R. R. Co.*, 10 Allen, 532.

Where a railroad crosses a public highway upon the same grade, the situation is itself a warning and an incentive to one about to cross to exercise vigilance, to the full extent of his opportunities, in the use of his senses of sight and hearing, in order to assure himself whether or not a train is approaching, so as to avoid collision; and where it appears that collision might have been avoided by the use of readily available precautions, there remains no ground for a recovery, unless an excuse be shown for such an extraordinary omission.

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Brown v. Milwaukee, etc., R. W. Co., 22 Minn. 165; *Abbott v. Chicago, etc., R. W. Co.*, 30 Minn. 482; *Mynning v. Detroit, etc., R. R. Co.*, 7 West. Rep. 324.

"A man must use his senses, and is not excused where he fails to discover the danger if he has made no attempt to employ the faculties nature has given him." *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; 2 Wood Railway Law, 1319, n. 2.

Conceding that it was the duty of the intestate to look before going upon the track, unless he had some valid excuse for not doing so, it is nevertheless contended that it did not directly appear by the special findings that he did not look, and hence it is argued, in effect, that, the contrary not appearing in the special findings, it is the duty of the court to presume, in support of the general verdict, that a valid excuse was shown for not looking.

The jury having found that the intestate could have seen the approaching train in time to have avoided injury if he had looked, and that there was nothing to prevent his seeing the train when it was two hundred feet distant from the crossing, if he had given attention and looked in that direction when he was nine feet away from the main track, the fact that he stepped on the track immediately in front of a moving train raises the presumption that he either did not look, or that he deliberately took the risk of attempting to cross, notwithstanding the approach of the train. In either case a recovery is impossible. The law presumes that one having the ordinary sense of sight must have seen that which was within the range of his vision, if he gave attention and looked, and if he saw the train approaching and pursued his way notwithstanding, he is to be regarded as taking the risk upon himself. *Cones v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328, and cases cited.

The special findings, therefore, necessarily exclude the idea that the intestate looked before going upon the track, in such a sense as to rebut the presumption of negligence, and they

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affirmatively show that he stepped in front of the moving cars while in a state of apparent abstraction, or indifference to the perils of the situation, and regardless of the warnings and outcries of the conductor and brakeman. Such conduct the law pronounces negligent. *Woodard v. New York, etc., R. R. Co.*, 106 N. Y. 369; *Rogstad v. St. Paul, etc., R. W. Co.*, 31 Minn. 208; *Tolman v. Syracuse, etc., R. R. Co.*, *supra*.

Moreover, the special findings affirmatively show that the intestate was not thrown off his guard or misled by anything that occurred on the occasion of the accident.

He had been accustomed to go to the depot about the same hour every day for two or three months, and the defendant had habitually detached the engine from the cars, as it did on the day of the injury. Nothing occurred, therefore, on the day of the accident with which he was not entirely familiar. Besides, the findings show that the engine had passed over the crossing several minutes before the train, which approached at the rate of four miles an hour, arrived. His attention was not distracted by one train following so close upon another, without warning, as to mislead him or throw him off his guard, nor did he enter upon the track after looking, influenced by an appearance of safety created by the company, as is the case where a flagman invites a traveller to cross. It is quite true that one may be excused from looking when a flagman or other person employed by the company, whose duty it is to look out for approaching trains, signals that it is safe to cross, and so one who approaches on a public highway, and uses such opportunity as the situation affords to look and listen, is not to be charged with negligence as against a railroad company which, by its neglect to give the required signals, lures him into danger. *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, and cases cited; *Greany v. Long Island R. R. Co.*, 101 N. Y. 419. The facts found make the present a case of an entirely different complexion from those relied on.

While nothing is to be taken by mere inference or intend-

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ment in aid of special findings as against a general verdict, they are nevertheless to be fairly construed, with a due regard to the issues and the burden of proof in the case, and if, after being thus construed, it is apparent that they establish facts which, if taken as true, defeat the plaintiff's right of recovery, the judgment should be for the defendant, notwithstanding the general verdict may have affirmed a right of recovery in the plaintiff. The present is such a case, and it follows, therefore, that the court erred in rendering judgment for the plaintiff over the defendant's motion.

The judgment is reversed, with costs, with instructions to the court below to maintain the appellant's motion for judgment on the special finding of facts, and to render judgment accordingly.

Filed March 13, 1889.

No. 13,633.

CAUBLE v. HULTZ ET AL.

HIGHWAY.—Drainage.—Right to Enter upon Private Lands.—Under section 16 of the act of 1883 relating to highways (Acts of 1883, p. 66), a ditch may be located on private lands only when suitable drainage can not be had in the roadway at the same expense.

SAME.—Selection of Location.—Duty of Supervisor.—If suitable drainage can not be had in the roadway, the land-owner may select the location of the ditch, and if the selection is accessible and suitable it is the duty of the supervisor to adopt it; but if the land-owner fails to point out the location, or if his selection is not accessible or suitable, the supervisor may make the location.

SAME.—Irreparable Injury.—Injunction.—If any question is made as to whether proper drainage can be had in the highway, or as to whether a location selected by the land-owner is a suitable one, the land-owner

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has a right to have it determined in a judicial proceeding, and he may maintain injunction to prevent irreparable injury.

SAME.—When Supervisor a Wrong-Doer.—The supervisor is a wrong-doer if he undertakes to construct a ditch on private lands when proper drainage can be had in the roadway, or, when it is necessary to go upon private grounds, if he refuses to accept a suitable location selected by the land-owner and locates the ditch elsewhere, and injunction will lie to prevent an injury from being inflicted upon the land-owner which can not be fully compensated in damages.

From the Washington Circuit Court.

S. H. Mitchell and *R. B. Mitchell*, for appellant.

S. B. Voyles and *H. Morris*, for appellees.

BERKSHIRE, J.—This is an action for injunction. There are two errors assigned :

1st. The court erred in sustaining the demurrer to the amended complaint.

2d. The court erred in sustaining the motion to dissolve the temporary restraining order issued and granted in the cause.

The amended complaint states substantially the following facts: That the appellee Hultz is the supervisor of Road District 3, in Jefferson township, in Washington county, Indiana, and the appellee Enochs is the trustee of said township; that the appellant is the owner of certain real estate situated in said township, which is described in the complaint; that on the 22d day of November, 1886, the appellee Hultz served a notice upon the appellant of his intention to enter upon the said real estate on the 29th day of November, 1886, for the purpose of constructing a ditch thereon, the said proposed ditch to commence on the west line of section 20, town. 4 north, of range 3 east, 192 rods north of the southwest corner of said section, and to run thence in a northeasterly direction about 30 rods to a washout or bayou into which it is to empty; that said bayou extends from White river into said real estate for a distance of about 60 rods; that the appellant has expended large sums of money in building and constructing banks

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across said bayou and in filling the same with dirt and other material, to prevent the influx of water from said White river and to cause said bayou to fill up and become tillable; that if said ditch is opened into said bayou it will prevent appellant from filling up the same, and thereby permit the water from White river to flow into and through said bayou, and wash away and destroy a large tract of valuable land belonging to the appellant, and wash away and separate from the main body of land about 20 acres, and render said 20 acres inaccessible and valueless; that if said ditch is constructed and opened into said bayou, the water flowing therein from said ditch and said river when there are freshets will gradually but surely wash away a large tract of appellant's land, and cause him great and irreparable injury; and it is further averred that the said appellees assert that the purpose of said ditch is to drain a certain highway situated on the west line of said section 20, known as the Spark's Ferry Road, but appellant avers that the said highway can be drained and repaired on the roadway at a cost not exceeding the cost and damages of entering upon the land of the appellant; that by constructing the ditch upon the roadway the dirt and material obtained therefrom can be used in grading said highway, and thereby improve and repair said highway more perfectly than the drainage proposed by said appellees; and that the appellant proposed to the appellees that he would select an appraiser, and they to select another, to act with the said appellee Hultz in assessing damages caused by the construction of said ditch, and that he have the privilege of offering evidence as to damages, and that the appraisers determine whether the drainage could be made on the roadway at as little cost as the cost and damages of entering upon his land and constructing said ditch, all of which the appellees refused, but asserted their intention of going upon the said real estate of appellant and constructing said ditch as proposed; and that the appellant then gave, and still gives, the said supervisor the privilege and permission to go upon

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his said lands and to construct a ditch to drain said highway ; that at the time he gave such permission he pointed out and designated the location of said ditch ; that said route, as located by the said plaintiff, is practicable (a description of the route is then given) ; that the location of said ditch as proposed by the appellant can be constructed at less expense than the cost and damages of the one proposed, and will completely and perfectly drain said highway ; that the appellee Hultz is acting under the order of the appellee Enochs, and is threatening to enter and go upon the said lands with a large force of men for the avowed purpose of digging and constructing said ditch, and has given the appellee notice of his said intention.

The demurrer to the complaint admits the truth of the facts as therein alleged. We are of the opinion that the facts alleged show something more than a simple trespass which can be compensated in damages.

The facts alleged show a case where, if the acts threatened are carried into execution, irreparable injury to the appellant will be the necessary result. We are therefore of the opinion that, unless there is some authority authorizing the threatened action of the supervisor, the complaint constitutes a cause of action. *Winslow v. Nayson*, 113 Mass. 411 ; *Frizell v. Rogers*, 82 Ill. 109 ; *McArthur v. Kelly*, 5 Ohio, 140 ; *Ross v. Thompson*, 78 Ind. 90 ; *Heagy v. Black*, 90 Ind. 534 ; *Kyle v. Board, etc.*, 94 Ind. 115 ; *Erwin v. Fulk*, 94 Ind. 235 ; 3 Pomeroy Eq. Jur., section 1357 ; *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248 ; *Town of Sullivan v. Phillips*, 110 Ind. 320 ; *Balfe v. Lammers*, 109 Ind. 347.

Section 16 of the act of 1883 is relied upon as giving to the supervisor the authority to do what is charged against him in the complaint. That section reads as follows : " The supervisor, or any other person by his order, may enter upon any land adjoining or near to any highway in his district, and thereupon construct such ditches, drains and dams, and dig and remove any gravel, earth, sand, or stone, or cut and re-

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move any wood or trees that may be necessary for the proper construction, repair, or preservation of such highways, and the supervisor, together with two disinterested persons, shall proceed at once to the locality and assess such damages in favor of the owner of the lands thereof, as in their judgment seems right and proper, and report the same under oath, which oath shall be administered by the supervisor to the two appraisers, and by the township trustee to the supervisor, within ten days after such assessment, to the trustee, having first given notice thereof to the party damaged, and such trustee shall pay the damages assessed, to be paid out of the township treasury. No person's land shall be entered when material can be found on the roadway, or convenient in the district on the roadways thereof, nor when drainage can be made on the roadway, at a cost not exceeding the cost and damages of entering upon private lands. In all cases contemplated by this section, demand shall first be made of the owner of the land before entering thereon or taking material. If he assent, he may point out the material and location from which to be taken, and if accessible and fit for the purpose intended, it shall be there taken. If consent be refused by the owner, the supervisor shall notify such owner of his intention to so enter, for what purpose, and for what time, and point out the land to be occupied, or the material to be taken. In all assessments of damages the owner shall be notified, and have leave to select one appraiser, and shall have notice of the time and place of the meeting of the appraisers, and privilege to offer evidence as to damages at the time of the assessment by the appraisers: *Provided*, That any person aggrieved may appeal from the action of the appraisers, by giving notice in writing to the road supervisor, to any justice of the peace in his township. Such notice must be given within ten days after final action by the appraisers, and such person shall give bond within thirty days after final action by the appraisers. Such bond shall be payable to the super-

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visor, and such bond shall be filed with and approved by the appraisers, and thereupon the papers shall be delivered to a justice of the township, and such appeal shall be determined as other questions are determined in civil cases before justices." Acts of 1883, p. 66.

The proviso above only allows an appeal from the assessment made by the appraisers. As to the right of the supervisor to go upon the land, and as to his right to go elsewhere than as pointed out by the land-holder, there is no provision for an appeal.

The Legislature has, by the foregoing statute, given the right to a supervisor to enter upon the land of another and at his pleasure locate and construct ditches, drains, etc., or it has given to him this power under certain restrictions and limitations. The section upon its face bears evidence of a want of care in its preparation, and it is somewhat difficult to determine fully what the legislative intention was.

It is first provided that the supervisor may enter upon the private lands adjoining or near a highway, and construct ditches, etc. It is then provided that, together with two disinterested persons, he shall at once proceed to the locality and assess such damages in favor of the owner of the lands as in their judgment seems right. Afterwards, it is provided that the owner shall be notified and shall have leave to select one of the appraisers, and shall have notice of the time and place of the meeting of the appraisers, with the privilege of offering evidence as to damages. Within ten days after the assessment, it is provided that the assessment shall be reported to the trustee, and that he shall pay the damages assessed out of the township treasury.

With some hesitation we have concluded that, under such circumstances as authorize the supervisor to enter upon the land of another, he may do so, and locate and build a ditch, drain, dam, and the like, or remove gravel, etc., as provided in the statute, and immediately thereafter notify the landholder, who may select one appraiser, and the supervisor an-

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other, who shall appraise the damages, and report to the supervisor, who shall report to the trustee within ten days after the appraisement, and that it then becomes the duty of the trustee, from funds in the township treasury, to pay the amount of the assessment; that it is not necessary to first assess and tender the damages.

It is provided, however, that no person's land shall be entered upon when material can be found on the roadway, or convenient in the district on the roadways, nor when drainage can be made on the roadway at a cost not exceeding the cost and damages of entering upon private lands and appropriating them to that purpose. It is then provided that in all cases contemplated by this section a demand shall first be made of the owner of the land before entering upon it or taking material. If he assent, he may point out the material and the location from which it is to be taken, and, if accessible and fit for the purpose intended, it shall be taken therefrom. If consent be refused by the owner, the supervisor shall notify him of his intention to so enter, for what purpose, for what time, and point out the land to be occupied or the material to be taken.

If the provision next before the last, as we have stated these different provisions, stood alone, it could not be contended with any plausibility that the land-holder would have the right to point out to the supervisor the place or locality whereon he should dig a ditch or drain or build a dam, and that his right to make a choice would be confined to the locality from which material should be taken; but when we take the preceding and following provisions, and construe all of them together, we have no difficulty in arriving at the conclusion that it was not the intention of the Legislature to confer upon the supervisor unlimited authority to enter upon private lands and appropriate such part thereof as may please his fancy for the purpose of constructing ditches, dams, etc., thereon, or removing dirt, gravel and the like.

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1st. No person's land shall be taken if the roadway can be utilized at the same cost.

2d. Demand shall first be made of the land-holder in all cases contemplated by this section.

3d. The provision that if he assent he may point out the material, etc.

4th. When consent is refused the supervisor shall notify the land-holder of his intention to enter upon the land, his purpose in so doing, the time at which he will do so, and he shall point out the land to be occupied or material to be taken.

Why make a demand of the land-holder if the supervisor has unlimited power to appropriate private land and locate a ditch or drain? We can see no good reason for so doing; but if the land-holder has the right to make a selection for the location of the ditch, then the reason for giving him notice is apparent. If the land-holder is only allowed to point out where the material is to come from, we can see no reason for the provision that, in case he refuse, the supervisor shall point out the land to be occupied. There would be no occupancy of the land in removing material from it; and then, the disjunctive is used, "point out the land to be occupied or the material to be taken."

Our conclusion is, that the statute only authorizes the location of a ditch on private lands when there can not be suitable drainage made in the roadway at the same expense that would follow in making it upon such private lands; that if the supervisor can not provide suitable drainage in the roadway, then the land-holder has a right to select the location for the drain or ditch, as the case may be, and if the selection is accessible and suitable, it is the duty of the supervisor to adopt it; but if the land-holder fails to point out the location, or if the selection he makes is not accessible or suitable, then the supervisor may make the location.

We are further of the opinion that if any question is made as to whether proper drainage can be made in the highway,

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or, where the land-holder has made a selection, as to its being a suitable one, the land-holder has a right to have the question tested in a judicial proceeding, and if irreparable injury will follow if the ditch or drain is constructed as insisted upon by the supervisor, an action for injunction is the proper action. If proper drainage can be made in the roadway, then the supervisor acts without any legal authority, and is a wrong-doer, if he undertakes to construct a ditch on private lands.

If the supervisor can not provide suitable drainage in the roadway, and the land-holder points out a location for the ditch, and the same is accessible and suitable, it is the supervisor's duty to accept the location thus pointed out, and if he refuses to do so, and locates the ditch elsewhere, he acts without authority of law, and is a wrong-doer. These are questions, not for the determination of the supervisor when raised, but for the courts, and if the action which the supervisor is threatening to take will, if carried into execution, work serious injury to the land-holder, and such as can not be fully compensated in damages, an action for injunction is the proper action.

We have examined the case of *McOsker v. Burrell*, 55 Ind. 425. That was a suit for damages for the obstruction of an ancient watercourse and the diversion of the course of the water, which obstruction and diversion caused an overflow of appellee's land to his damage. That case rests upon section 16, 1 R. S. 1876, p. 858. Under that section of the statute the supervisor was empowered to enter upon any land adjoining or near to any highway, and construct ditches, etc., necessary for the proper construction, repair or preservation of any highway within his district. This court in that case says that the statute authorized the supervisor to do just such acts as he is charged with having committed; that there were only two conditions necessary to the exercise of the authority given him, (1) that the land on which he entered must have been adjoining or near to a highway in his district, and (2)

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that what was done must have been necessary to the construction, repair or preservation of a highway. It seems that the conditions existed, for the court uses this language: "When such conditions exist, the supervisor may perform the acts, whether they damage any person or not. If they do cause damage, and the damage is of a character entitling the injured party to redress, the statute points out the mode in which it may be obtained."

The statute under consideration contains the same conditions that were in the former statute, with the additional and more important ones to which we have referred.

It not only does not appear in the complaint before us that the conditions existed authorizing the supervisor to take action, but it appears therein, and is admitted by the demurrer, that the conditions did not exist.

We reach the conclusion, therefore, that the complaint is good, and that the demurrer should have been overruled. We are of the opinion that the appellee Enochs is a proper party to the action, and that the complaint is good as to him.

We need not determine whether the court erred in dissolving the temporary injunction.

The judgment of the court below is reversed, with instruction to overrule the demurrer to the complaint, and, upon a bond being filed by the appellant, to the approval of the court, that a temporary injunction be granted.

Judgment against the appellees for costs.

Filed March 12, 1889.

Henry et al. v. Thomas, Executor, et al.

No. 14,222.

HENRY ET AL. v. THOMAS, EXECUTOR, ET AL.

PRACTICE.—Pleading.—Exhibit.—Part of Record.—Bill of Exceptions.—Where a paper is properly a part of and is copied into the record as an exhibit filed with and as a part of a pleading, it need not be re-copied into the bill of exceptions, but it is sufficient to refer to it in the bill and state the fact that it was admitted in evidence and that a copy of it appears at a particular place in the record.

WILL.—Construction of.—Courts, in construing wills, will give due regard to the natural impulses and feelings of mankind, and take into consideration the general laws of descent and the rules for the disposition of estates, and beneficiaries will be held to take *per stirpes* unless the language used in the devise or bequest excludes such an intention.

SAME.—When Devisees Take Per Stirpes.—A testatrix provided by her will that her property should “be divided equally between my brothers and sisters, and the children of deceased brothers and sisters, and the brothers and sisters of Perry J. Brinegar (her deceased husband), and the children of deceased brothers and sisters.”

Held, that the children of deceased brothers and sisters of the testatrix and of her deceased husband take *per stirpes*, and are not entitled to share *per capita* with the living brothers and sisters.

SAME.—Phrase “to be Divided Equally.”—Meaning of.—The words “to be divided equally” apply as well to a division among classes as among individuals.

From the Marion Circuit Court.

J. F. Carson, C. Thompson, R. Denny and J. R. McFee,
for appellants.

L. H. Reynolds, H. C. Allen, C. L. Henry and H. C. Ryan,
for appellees.

OLDS, J.—Mary Ferrell died September 5th, 1884, testate, leaving surviving her Andrew Ferrell, her husband, and brothers and sisters and children of deceased brothers and sisters, and brothers and sisters and children of deceased brothers and sisters of her deceased husband. The testatrix was childless. By her will she gave her husband \$2,000, and then provided as follows: “The balance of my estate I will

118	23
127	280

118	23
123	604

118	23
135	291

118	23
155	550

118	23
162	36

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and bequeath as follows: To be divided equally between my brothers and my sisters and the children of deceased brothers and sisters, and the brothers and sisters of Perry J. Brinegar, deceased, and the children of deceased brothers and sisters, except the following, to wit: the heirs of Henry Brinegar, deceased, to whom I will the sum of one dollar, and to Serilda Rohbacke I will one dollar, and to Martha Barrett one dollar, and to Milton Henry one dollar, and this is all I give and bequeath to these out of my estate."

A controversy arose among the general legatees as to the portion they were each entitled to receive under the provisions of the will as hereinbefore quoted, some claiming that the remainder of the estate should be distributed so as to give to each of the children of a deceased brother and sister of herself, and to each of the children of deceased brothers and sisters of Perry J. Brinegar, a portion of her estate equal to the portion given to each of her surviving brothers and sisters and the surviving brothers and sisters of Perry J. Brinegar, deceased, Perry J. Brinegar being the deceased husband of said testatrix. In other words, some of the legatees claimed that the distribution should be *per capita*, and others claimed that distribution should be made *per stirpes*.

The executor filed his petition in the court below, showing such contention among the legatees, and requesting the court to construe the will and declare its true meaning and intent.

Upon the filing of said petition by the executor, the appellants filed their cross-petition, making the record of the will and probate thereof a part of the same, and asking the court to adjudge each of them entitled, under the provisions of the will, to one-twelfth ($\frac{1}{12}$) of that part of the estate in controversy, upon the theory that the will provides that distribution should be made *per stirpes* and not *per capita*.

Following this, appellee Sarah A. Henry, as guardian of six minor children of William H. Henry, a deceased brother of said testatrix, filed a cross-petition showing that there are twenty-five legatees entitled to share in the portion of the

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estate in controversy, and claiming that each is entitled to an equal share thereof. Perry J. Rhue and others, appellees, filed a cross-petition, making a copy of the will an exhibit, and alleging that in order to distribute said estate it was necessary for the court to construe said will, and asking that the same be construed and the interest of the legatees determined. Thereupon the cause was submitted to the court. The will was offered in evidence, and the court found the names and number of the legatees, brothers and sisters of the testatrix and of her deceased husband, and children of deceased brothers and sisters of testatrix and her deceased husband, twenty-five in number, and that they were each entitled to a one twenty-fifth ($\frac{1}{25}$) part of said estate under the will, and made an order and rendered a judgment for the distribution of said estate accordingly.

The appellants filed a motion for a new trial, which was overruled, and exceptions reserved to the ruling by the appellants.

The first cause assigned for a new trial is, that "the decision of the court is not sustained by sufficient evidence." The second alleged that "the decision of the court was contrary to law."

We think these properly challenge the construction given to the will, as it fairly appears from the bill of exceptions that the will was all the evidence submitted to the court. The only contest was as to the construction to be given the language used in the devise of the remainder of the estate of the testatrix, and no other evidence was competent in the case, unless there was such ambiguity in the language used as to admit of parol evidence, and there was no such ambiguity in the will in controversy as to admit of parol evidence to aid in its interpretation.

It is contended by counsel for appellees that the will is not properly included in the bill of exceptions, and, therefore, can not be considered. The will is made an exhibit to the cross-petition of Perry J. Rhue and others, and as such is

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properly copied into the record on page 17 of the transcript. The bill of exceptions states that the will was in evidence, and is copied on page 17 of the record.

When a paper is properly a part of the record as an exhibit which is made a part of a pleading, and once copied into the record, it is useless to re-copy it into the bill of exceptions, and it is sufficient to refer to it in the bill of exceptions, and state the fact that it was admitted in evidence, and that a copy of it appears at a particular place in the record. To hold otherwise would be to require a needless encumbrance of the record. We do not say that this is a model bill of exceptions, but in this case copies of the will were set out and made a part of the petitions and cross-petitions filed by the various legatees. There were no facts in dispute; all that was asked of the court was to construe certain language in the will, the terms of which were not disputed. And the court was asked to decide what share each legatee took by virtue of the will, and to make an order for the distribution of the estate in accordance with the construction given. No answers were filed to the petition or cross-petitions, no denial of any of the allegations in either of them; so that the facts as alleged in the petitions were admitted, and the court was called upon to make a finding and render judgment on the facts as admitted by the pleadings. There was no necessity for any evidence, and the bill of exceptions states that "immediately upon the filing of the petition and cross-petitions the court announced its readiness to hear the same, whereupon the attorneys for petitioners and cross-petitioners commenced to argue to the court the question as to what construction should be given to the will."

While the record shows the proceedings to be somewhat informal, yet we think in this particular case it properly presents the question to this court.

The question presented is one upon which the authorities are not harmonious.

It has been the almost universal rule of law-making bodies,

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in providing to whom the estate of an intestate shall descend, to provide that the estate shall go to the nearest relatives, and in case of the death of one who would have inherited if living, but who has died, leaving issue surviving, that the surviving issue take the share the parent would have inherited if living; that, when children inherit from the parent, and one dies prior to the death of the parent, leaving children surviving, the child or children of such deceased child take the share the deceased child would have inherited if he or she were living; and this rule has almost universally been adopted when the estate descends to the brothers and sisters of an intestate. Such laws of descent have met with universal approval. Where one estate is disposed of otherwise by will, many pass in the manner prescribed by the law of descent. It is the natural impulse of mankind to have a greater affection for, and be more willing to aid, those who are bound to them by the near ties of relation or kinship than those further distant, and the ties which bind kindred together are strong or weak, owing to the degree of kinship. True, there are exceptions to this rule; social or business relations may be such as to bind one more closely to distant than to near relatives, but such are exceptions. Courts, in construing both wills and statutes of descent, will give due regard to the natural impulse and feelings of mankind, and take into consideration the general laws of descent and the rules for the disposition of estates.

The will in this case, it may be said, divides the legatees into two classes—the testatrix's brothers and sisters and the brothers and sisters of Perry J. Brinegar, and the children of her deceased brothers and sisters and the children of the deceased brothers and sisters of Perry J. Brinegar. Perry J. Brinegar, as it appears by the proceedings, and is admitted, was the deceased husband of the testatrix. She first provides for her husband by giving him two thousand dollars, then she provides for her own brothers and sisters and the brothers

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and sisters of her deceased husband, and the children of those who are dead.

As admitted by the pleadings and found by the court below, there are twenty-five in all who take as legatees. The testatrix has no children; she is disposing of her own estate, and in the disposition of it she seeks to treat her own kindred and the kindred of her first husband alike. It is the natural presumption, unless it appears to the contrary, that she would make them the objects of her bounty in proportion to the degree of kinship existing between her and them, treating, as it clearly appears, the brothers-in-law and sisters-in-law the same as the brothers and sisters of her own blood.

We think the proper construction to be given to this will, and the manifest intention of the testatrix, was to give to the children of each deceased brother and sister of herself and deceased husband the same share that their parent would have taken if living—the child or children of one deceased brother or sister to take the same share that one living brother or sister should take. In legal phraseology, they take *per stirpes* and not *per capita*. We are supported by the weight of authority in this construction.

The case of *Wood v. Robertson*, 113 Ind. 323, was a devise almost identical with this. In that case the will made a devise as follows: "I give and devise to my beloved wife the farm on which I now reside, as well as all my other real estate of which I may die legally possessed; also, all the personal property of whatever description of which I may die the owner, to have and to hold during her natural life; and at her death it is my will that whatever remains of my estate, whether real or personal property, in the hands of my wife, shall be equally divided among my children then living and the descendants of such as may be dead, share and share alike, taking into consideration all advancements which may have been made either by myself or my wife." The court, in construing the will in that case, says: "We deem it clear that the intention of the testator was to give his chil-

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dren and their descendants or heirs the same estate as the law would give them, that is, that the children living should share alike, and the children or descendants of the dead should take the share that would have fallen to the father or ancestor had he been living. To put our conclusion in more technical terms, we decide that the beneficiaries of the testator's bounty take *per stirpes* and not *per capita*." The case of *Houghton v. Kendall*, 7 Allen, 72, and authorities there cited, support this construction.

In the case of *Raymond v. Hillhouse*, 45 Conn. 467, the eighth clause of the will is as follows: "All the residue of my estate, real and personal, I give and devise to the following named persons, to be divided equally among them: My sisters Rachel and Sarah, the grandchildren of my brother William, and the grandchildren of my deceased sisters Delia and Mary; meaning by this to include all said grandchildren living at the time of my decease; provided that the share of Elizabeth Raymond, daughter of my deceased nephew James H. Raymond, shall be held by John Beach, of Goshen, in trust for her benefit as hereinafter provided." There were living at the testator's decease two grandchildren of the testator's brother William, three of his sister Delia, and fourteen of his sister Mary; and the question submitted to the court was, whether these grandchildren took under the will *per stirpes*, or all the legatees took *per capita*, and the court held they took *per stirpes*.

In the will in this case there are designated two classes of beneficiaries, viz., the brothers and sisters of the testatrix and her deceased husband, Perry J. Brinegar, living at her decease, and the children of such brothers and sisters as are dead. It is fair to presume that in providing for the brothers and sisters that might be living, she intended to provide for and give to them a certain portion of her estate. The children of deceased brothers and sisters relate to the children of the brothers and sisters who die before the death of the testatrix, hence at the time of the execution of the will it

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could not be known to her how many brothers and sisters there would be living at the time of her decease, nor how many children of deceased brothers and sisters would survive her; they may have been so numerous as to have reduced the share of a surviving brother and sister very materially from the amount they would receive had there been no births or deaths between the execution of the will and the death of the testatrix, if the will be construed so as to distribute the estate *per capita*.

The words "to be divided equally" apply as well to a division among classes as among individuals. *Raymond v. Hillhouse, supra*.

The rule as stated in Jarman on Wills is, that, when a devise or bequest is made to "my son A., and the children of my son B.," in which case A. takes only a share equal to that of one of the children of B., they take *per capita*. It may be said that it is stated by the same author that this "mode of construction will yield to a very faint glimpse of a different intention in the context." 2 Jarman Wills, pp. 756 and 757.

Of this rule the court, in the case of *Raymond v. Hillhouse, supra*, says: "If the above rule is so easily set aside, it would seem equally reasonable that it should also yield to the presumption in favor of the natural heirs or next of kin, for a distribution according to the statute, in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt."

This rule has been so far abrogated by the courts of the different States that it no longer has any practical force in the construction of wills, and the weight of authority is to the effect that the beneficiaries take *per stirpes*, unless the language used in the devise or bequest is such as to exclude that intention. *Minter's Appeal*, 40 Pa. St. 111; *Fissel's Appeal*, 27 Pa. St. 55; *Clark v. Lynch*, 46 Barb. 68; *Vincent v. Newhouse*, 83 N. Y. 505; *Bool v. Mix*, 17 Wend. 119; *Alder v. Beale*, 11 Gill & J. 123.

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The court erred in the construction given to the will, and the finding and decision of the court was erroneous.

The judgment is reversed, at costs of appellees, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed March 12, 1889.

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No. 13,484.

BUTT v. BUTT ET AL.

SUPREME COURT.—*Assignment of Errors.—Brief.—Waiver.*—Errors assigned by the appellant, but not discussed in the brief of his counsel, are waived.

SAME.—*Intermediate Errors.—When not Available for Reversal.*—Where the judgment is clearly right on the facts found, it will not be reversed on account of intermediate errors.

From the Cass Circuit Court.

S. T. McConnell and D. B. McConnell, for appellant.

J. Mitchell, N. O. Ross and J. L. Farrar, for appellees.

COFFEY, J.—This cause was reversed by this court when here before on account of the error of the circuit court in sustaining a demurrer to the complaint. *Butt v. Butt*, 91 Ind. 305.

As will be seen by a reference to the complaint, as set out in that case, the appellant seeks to redeem the land in controversy by virtue of an agreement alleged to have been made between him and appellee William Butt to extend the time for redemption from a sheriff's sale. The land had been sold on a decree of foreclosure and bid in by one Hanley, who as-

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signed the certificate of purchase to Elbert H. Shirk, who afterwards, and before the expiration of the year for redemption, assigned the same to the appellee William Butt. The appellant alleges that, by the terms of the agreement between him and said appellee, he was to have six years in which to redeem, and that, relying on said agreement, he did not redeem within the year, as he otherwise would have done, and that after the expiration of the year the appellee William Butt took a sheriff's deed on said certificate, ousted the appellant from the land, refused to allow him to redeem, and denied his right so to do.

After the return of the cause to the court below the appellee William Butt filed an answer in several paragraphs, the first of which was a general denial, and the others special pleas by way of confession and avoidance. He also filed a cross-complaint in several paragraphs. Demurrers were filed to these affirmative answers, and also to the several paragraphs of the cross-complaint, which were overruled by the court and an exception reserved.

One Barnett was made a party defendant to the action by the permission and order of the court, and he also filed a cross-complaint, to which the appellant filed a demurrer, which was overruled, and he excepted.

The appellant then filed replies to the several answers and answers to the several cross-complaints, and the cause, being at issue, was tried by the court without the intervention of a jury. At the request of the parties the court made a special finding of the facts in the cause, with its conclusions of law thereon, and rendered judgment against the appellant for costs.

The appellant assigns for error in this court: That the court erred in overruling the demurrer of appellant to the fourth, fifth and sixth paragraphs of the answer of William Butt to the complaint; that the court erred in overruling the demurrer of the appellant to the cross-complaint of William Butt; that the court erred in overruling the demurrer of

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appellant to the cross-complaint of Andrew J. Barnett; and that the court erred in its conclusions of law on the special finding of facts.

As the last error assigned is not discussed in the brief of counsel for the appellant, under the rules of this court it is waived.

The appellant, in his brief, discusses the other errors at some length, but he makes no objection to the special finding of the facts.

The special finding of facts shows that the agreement for the extension of the time for redemption from the sheriff's sale set up in the complaint did not exist.

As the answers to which demurrers were overruled are special answers by way of confession and avoidance, it is wholly immaterial as to whether the court erred or not in its rulings. Where the judgment is clearly right on the facts, it will not be reversed on intermediate errors. *Foster v. Bringham*, 99 Ind. 505; *Whitworth v. Ballard*, 56 Ind. 279; *Mitchell v. Johnson*, 60 Ind. 25; *McComas v. Haas*, 93 Ind. 276; *Fell v. Muller*, 78 Ind. 507; *Mason v. Mason*, 102 Ind. 38; *Trammel v. Chipman*, 74 Ind. 474; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480.

On the facts found by the circuit court the judgment is clearly right. There is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed March 14, 1889.

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No. 13,541.

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HUSBAND AND WIFE.—*Tenants by Entireties.*—*Quitclaim Deed from Husband to Wife.*—*Effect of.*—*Survivorship.*—Where a husband and wife own real estate by entireties, a quitclaim deed from the husband direct to the wife, in which she does not join, but which she accepts and acts upon, is valid, and vests in the wife the whole estate in the land, and defeats the husband's right of survivorship.

From the Wayne Circuit Court.

W. F. Medsker and *C. E. Shiveley*, for appellant.

T. J. Study, for appellees.

OLDS, J.—This is an action to quiet title to real estate. The complaint alleges that the appellant, the plaintiff below, is the owner in fee simple and entitled to the possession of the following described real estate in the county of Wayne and State of Indiana, to wit: The north half of the northeast quarter of section 12, in township 16 north, of range 12 east, containing eighty acres more or less; that he acquired title to the real estate in the following manner, *i. e.*: On the 23d day of December, 1876, one Abiram Boyd, who was then and there the owner in fee of said lands, and in possession thereof, executed and delivered a deed, with covenants of warranty, conveying said lands to Martha Enyeart and William Enyeart, the plaintiff, who were then and there husband and wife; that afterwards, on the 15th day of December, 1880, and while the plaintiff and his said wife were owning and in possession of said real estate, the plaintiff executed and delivered to his said wife, Martha Enyeart, a quitclaim deed purporting to convey said real estate to his wife, in which deed his wife did not join; that, on the 8th day of December, 1885, said Martha, while the wife of the plaintiff, departed this life, testate, at the county of Wayne and State

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of Indiana, at which time said Martha and plaintiff were occupying said land; that Martha devised the whole of said land to the defendants; that under the provisions of the will defendants are claiming an interest in said real estate adverse to the plaintiff, which claim is without right and unfounded and a cloud upon the plaintiff's title; that the deed executed by the plaintiff to his wife is void and of no effect, and plaintiff takes the said real estate as surviving husband and widower of his deceased wife, Martha Enyeart. Prayer for judgment quieting title.

Appellees demurred to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. Plaintiff refused to amend and the court rendered judgment upon demurrer for appellees. The ruling of the court in sustaining the demurrer to the complaint is assigned as error.

The conveyance of the land by Abiram Boyd, who owned the same in fee simple, to William B. and Martha Enyeart, husband and wife, vested the title in them by entireties. It is insisted by counsel for the appellant that the quitclaim deed by appellant to his wife was void for the reason that the husband had no such interest in the land as he could convey to the wife; that an estate vested in the husband and wife by entireties can not be conveyed by the husband without the wife joining in the deed, and that a deed direct from the husband to the wife is void and passes no title, and the husband as survivor takes the whole title.

The rule in regard to estates by entirety is, that neither tenant can sever the union of interest without the consent of the other, but this is construed to mean that the one can not sever the interest or make any disposition of the estate so as to affect the right of survivorship. In the case of *Washburn v. Burns*, 34 N. J. L. 18, the court, in speaking of the husband's rights in an estate by entirety, says: "The limit of this right of the husband is, that he can not do any act to the prejudice of the ulterior rights of the wife." 1 Bishop

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Law of Married Women, section 622; *Ames v. Norman*, 4 Sneed, 683. There is a discrepancy in the authority as to the right of the husband to convey or encumber his interest in the estate without the assent of the wife, and as to whether or not the interest of the husband is liable to sale on execution against him, some authorities holding that he may convey or encumber his interest by deed without the assent of the wife, and that his interest is subject to sale on execution and that such deed or sale passes all the title of the husband in the land, and in case the husband survives the wife the purchaser takes the fee in the land; but by a long line of decisions in our own State, it is held that the husband can not convey or encumber his interest in the land without the assent of the wife, and that his interest is not subject to sale on execution.

1 Washburn Real Property (5th ed.), p. 706, section 2, in treating of estates by entirety, says: "In such case, the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; so that if, for instance, the wife survive and then dies, her heirs would take to the exclusion of the heirs of the husband."

It is the prevailing doctrine that a severance of the marital relation by divorce also severs the estate, and after divorce they no longer hold by entirety, but as joint tenants, or tenants in common, owing to the differing policies and laws of the States. 2 Bishop Marriage and Divorce (6th ed.), section 716; *Harrer v. Wallner*, 80 Ill. 197. It may be regarded as settled by the weight of authority that the husband's interest in the real estate is vested in him by the deed; that on the death of the wife the estate is simply freed from participation by her. The husband and wife are each seized of the whole estate, and, under the decisions of this State, they have equal rights to the possession, the survivor taking the whole estate upon the death of his co-tenant. It follows, therefore, that the husband, the appellant in this case, at the

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time he executed the quitclaim deed to his wife, had an interest in the real estate; that he was seized of the whole estate by a title which would descend to his heirs, subject only to be defeated by the wife surviving him, in which event she would take the whole of the estate.

It remains then to be determined whether the husband can convey such title as he has in the real estate to the wife by deed direct from him to his wife.

In the case of *Dodge v. Kinzy*, 101 Ind. 102, the court collects the authorities on this question, and holds that a mortgage, executed by the husband and wife on an estate held by entirety, securing the individual debt of the husband, is void both as to the husband and wife. That decision is based upon the theory that the law of this State prohibits and makes void the contract of the wife encumbering her real estate as security for the debt of the husband, and the mortgage being void as to the wife, it had no greater force than if executed by the husband without the wife joining. The former decisions of this court being to the effect that the husband could not encumber or convey said estate without the assent of the wife, her void act in joining in the mortgage did not operate as an assent on the part of the wife, hence the mortgage was void as to both.

No disabilities attach to the husband to affect his conveyance of real estate. He can receive and convey title just the same as if he were unmarried, except that he can not dispose of or in any manner affect the inchoate right of his wife in and to his real estate. The decisions of this court only go so far in regard to estates by entireties as to hold that the husband can not convey or encumber the estate without the assent of the wife; upon the contrary, it is manifestly true that he can convey and encumber said estate by and with the assent of the wife, by her joining in the deed, except in case of a mortgage or encumbrance of suretyship on the part of the wife, her contract of suretyship being absolutely void.

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By the laws of this State, and the decisions of this court, the husband may convey his interest in real estate held in any other manner than by entirety, and may convey such interest by and with the assent of the wife, unless the assent of the wife be given to secure the debt of the husband. In the case of suretyship she is prohibited from giving her assent, and if given it is void and of no effect. There is no inhibition on the wife's right to receive title to real estate. This being the status of the parties, we can see no good reason why the husband can not convey title to real estate to the wife, and the wife receive title from him. The decisions of the court only go to the effect that the husband can not convey his interest in an estate by entirety without the assent of the wife. In the case of a conveyance by the husband to the wife of his interest, and her acceptance of the deed, it operates as a relinquishment of the husband's right as survivor.

As in this case the husband conveys the real estate in question to the wife, and she accepts the deed, and afterwards disposes of the real estate by will, this would constitute such an assent on the part of the wife, within the meaning of the decisions of this court, as would make the deed valid, and pass the title to the wife; if, indeed, it can be said, in case of a conveyance of the husband's interest to the wife, any assent is necessary more than the acceptance of the deed, as such a conveyance does not attempt to take from, but rather add to, her interest in the land.

By some of the early decisions of this court it was held that a deed direct from husband to wife was void in law, but would be upheld in equity. In the discussion of the validity of a deed direct from the husband to the wife, in the case of *Thompson v. Mills*, 39 Ind. 528, we think the court laid down the proper doctrine. The court in that case says: "As the fact is recognized that the husband may, by deed, made directly to his wife, convey real estate to her, and the conveyance will be upheld, why not apply to such conveyances the same rules which are applied to conveyances

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between other parties, that is, hold them valid until some legal reason has been shown for setting them aside.”

The deed from appellant to his wife was valid, and passed all the interest the husband had in the land to his wife. Suppose the husband and wife should have joined in a deed and conveyed the land to a third person and such third person conveyed the land to the wife, the legal title would have passed from the husband and wife and been received back by the wife. If they could convey title in that manner, as they surely could have done, there is no sound reason why, under our laws, they could not by agreement pass the title by deed direct from the husband to the wife, he executing and she accepting the conveyance. Such a deed is valid unless attacked for some cause other than that they were husband and wife at the time of the execution of such conveyance.

There was no error in the ruling of the court sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed March 14, 1889.

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130	332
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165	561

No. 14,565.

JONES v. THE STATE.

CRIMINAL LAW.—Evidence.—Objection.—Waiver.—By failing to object to a competent question the adverse party does not waive his right to move to strike out the answer, or such part of it as may be incompetent.

SAME.—Motion to Strike Out Evidence.—It is not error to overrule a motion to strike out evidence where part of the evidence embraced in the motion is competent.

SAME.—Rape.—Good Character of Defendant.—Examination of Witnesses.—In

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a prosecution for rape, it is proper to refuse to permit a witness, who testifies to the defendant's good character, but who admits on cross-examination that he has heard charges against him, to be asked, on re-examination, if he ever heard any of his neighbors say that they believed the defendant was guilty of any outrage in a blackberry patch. **SAME.**—*Conviction of Assault and Battery under Indictment for Rape.*—A defendant may be convicted of assault and battery under an indictment charging him with having committed a rape.

From the Fayette Circuit Court.

R. Conner, H. L. Frost and G. C. Florea, for appellant.

L. T. Michener, Attorney General, *C. Roehl, J. M. McIntosh, D. W. McKee and J. I. Little*, for the State.

ELLIOTT, C. J.—The appellant was charged in the indictment upon which he was tried with the crime of rape, but was convicted of assault and battery.

A question was asked the principal witness for the State, which was not objected to, and it is insisted that as no objection was interposed to the question the appellant had no right to move to strike out the answer of the witness. This is an untenable position. The question was in form and substance a proper one, and, of course, could not have been successfully assailed, so that an objection would have been unavailing. The appellant, therefore, did not lose the right to move to reject the answer by failing to object to the question. Where the question is a competent one and the answer incompetent, the correct practice is to move to strike out the answer. If all of it is incompetent, then the motion should go to the entire answer, or if only part is incompetent, then the motion should be to strike out that part. *Gould v. Day*, 94 U. S. 405; *Barnes v. Ingalls*, 39 Ala. 193.

Much, if not all, of the answer of the witness was competent, and the trial court did not err in refusing to entertain the motion to reject. It is well settled that it is not error to overrule a motion to strike out evidence where part of the evidence embraced in the motion is competent. Counsel must sift the incompetent from the competent and not

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impose that work upon the court. *Day v. Henry*, 104 Ind. 324; *City of Terre Haute v. Hudnut*, 112 Ind. 542, and cases cited; *Pape v. Wright*, 116 Ind. 502; *St. Louis, etc., R. W. Co. v. Hendricks*, 48 Ark. 177 (3 Am. St. Rep. 220).

The trial court did right in refusing to permit a witness, who testified to the good character of the appellant, but admitted on cross-examination that he had heard charges against him, to be asked, on re-examination, this question: "Did you ever hear any of his neighbors say that they believed he was guilty of any outrage in a blackberry patch?"

A defendant may be convicted of assault and battery under an indictment charging him with having committed a rape. *Mills v. State*, 52 Ind. 187; *Richie v. State*, 58 Ind. 355; *State v. Lindsey*, 19 Nev. 47 (3 Am. St. Rep. 776).

Judgment affirmed.

Filed March 14, 1889.

No. 13,638.

VENEMAN v. JONES.

MUNICIPAL CORPORATION.—Ordinance.—Regulation of Vehicles at Railroad Depot.—A city has power to enact an ordinance authorizing police officers to prescribe the places where omnibuses, hacks and other vehicles shall stand at a railroad depot, and requiring drivers to obey the directions of such officers in regard to the places which their respective vehicles shall occupy.

SAME.—False Imprisonment.—Inducing Officer to Make Arrest.—Justification.—Where the place assigned the owner of a vehicle is taken possession of by another person, who refuses to vacate it upon request, the former is justified in representing the facts to a police officer, and is not liable for inciting an arrest where the officer, upon the continued violation of the ordinance in his presence, arrests the offending party.

From the Vanderburgh Circuit Court.

Veneman v. Jones.

C. L. Wedding, for appellant.

J. E. Williamson, for appellee.

MITCHELL, J. — Jones complained of Veneman, and charged that the latter wrongfully caused the plaintiff to be arrested and falsely imprisoned by a police officer in the city of Evansville, by representing to the officer that he had violated certain ordinances of the city, and by demanding of the officer that he arrest the plaintiff. It is charged that, after causing him to be arrested and imprisoned, the defendant failed and refused to prefer any charge against the plaintiff, but that he was discharged without any accusation having been lodged against him.

The defendant answered, in substance, that, at and prior to the date of the arrest, there was in force in the city of Evansville a certain ordinance which authorized the depot marshal, or any police officer of the city, to prescribe or designate the place where hacks, coaches, omnibuses and other vehicles should stand while waiting for passengers at the railroad depot, and which prescribed certain penalties to which hackmen and others were liable who refused to conform to the directions of the officers named in the respects mentioned. It is averred that prior to the date of the arrest complained of, the proper officers, in obedience to the command of the ordinance, had designated certain space near the depot which was to be occupied by omnibuses, and certain other space for hacks, cabs and the like, and that the defendant was the owner of two omnibuses, and had certain space assigned him by the officers, which he was entitled to occupy with his horses and vehicles, and that on the day of the arrest complained of the plaintiff placed his cab on the space assigned to omnibuses, and thereby excluded the defendant's omnibus from the place assigned it. It is further averred that this was done in the presence of William McFarland, a police officer of the city, who requested the plaintiff to move his cab out of the position it then occupied,

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which the plaintiff refused to do, but persisted in remaining in the place assigned to omnibuses, in violation of the city ordinance, for which violation, so committed, the officer above named arrested him, and that this was the same arrest complained of by the plaintiff in his complaint. The court sustained a demurrer to the answer, and the propriety of this ruling is the only question involved in this appeal.

There is no brief for the appellee, and we are hence without information as to the theory upon which the court proceeded in holding the answer insufficient.

There can be no question but that the ordinance authorizing the depot marshal to prescribe the places where omnibuses, hacks and other vehicles should stand at the railroad depot, and requiring drivers to obey the directions of police officers in regard to the places which their respective vehicles should occupy, was a proper regulation, and one which the municipal authorities had the power to pass. *City of St. Paul v. Smith*, 27 Minn. 364; *Commonwealth v. Robertson*, 5 Cush. 438; *Commonwealth v. Stodder*, 2 Cush. 562; *Horr & Bemis Munic. Ord.*, section 247.

Such regulations tend to the convenience of the general public by protecting persons from the annoying solicitations of hackmen and others, who, when acting without restraint, often confuse travellers, besides engendering strife and contention among themselves.

The ordinance being valid, it only remains that we inquire whether or not the defendant, whose privileges were being confessedly infringed by its violation, was justified in representing the fact to the police officer, and whether the officer, whose authority was defied, was justified in making the arrest, the plaintiff, as is confessed by the demurrer to the answer, being at the time in the persistent violation of the ordinance.

Among other things, the ordinance commands the depot marshal, or in his absence his deputy, or any member of the police force, to maintain order at the depot, and arrest and

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take before the recorder for examination any person who, in his view or cognizance, violates any of the provisions of the ordinance.

By the common law, so far as we are advised, such officers as depot marshals, or policemen, were unknown as conservators of the peace. But where officers, even though unknown as such to the common law, are expressly authorized by statute, or by a municipal ordinance duly enacted, to conserve the peace, they have all the common law authority of constables or peace officers, and may apprehend and take into custody those who violate the law or ordinances of a city in their presence, without warrant. *Wiltse v. Holt*, 95 Ind. 469, and cases cited; *State v. Freeman*, 86 N. C. 683; *Beville v. State*, 16 Texas App. 70; *State v. Holcomb*, 86 Mo. 371; 7 Am. & Eng. Ency. of Law, pp. 675-676.

To hold that officers charged with preserving the peace of a city, and who are especially commanded to arrest those who violate its ordinances within their view or cognizance, are nevertheless without power to that end, without a formal warrant, and that one whose personal rights are being defiantly invaded, in violation of an ordinance, may not invoke the aid of a peace officer who is near by, would effectually tie the hands of the officers, and compel others either to submit to the turbulent and lawless or maintain their rights as best they may.

It is to be observed that this is not an action against the officer for making a false arrest, nor is it charged that the defendant arrested and falsely imprisoned the plaintiff. The charge is that the defendant incited or induced the officer to arrest the plaintiff, by representing that he was violating a city ordinance, and by demanding of the officer that he arrest the plaintiff. The defendant justifies by answering that the plaintiff was at the time of his arrest actually violating a city ordinance in the view and presence of the officer who made the arrest. This presents a complete justification.

If one directs the attention of an officer to what he sup-

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poses to be a breach of the peace, and the officer, without other direction, arrests the offender on his own responsibility for what he assumes to be an offence committed in his presence, the person who did nothing more than to communicate the facts to the officer is not liable for false imprisonment, even though the arrest was unlawful. *Taaffe v. Slevin*, 11 Mo. App. 507; *Lark v. Band*, 4 Mo. App. 186. Thus, where a policeman made an arrest upon an unfounded charge preferred by a third person, and not committed in the presence of the officer, Lord DENMAN said: "If the defendant directed the police officer to take the plaintiff into custody, he is liable in the present action for false imprisonment; but, if he merely made his statement to the constable, leaving it with the constable to act or not as he thought proper, * * then the defendant will not be liable, at least in this form of action." *Hopkins v. Crowe*, 7 Car. & P. 373.

One who merely states to an officer what he knows of a supposed offence, even though he expresses the opinion that there is ground for an arrest, "but without making any charge or requesting an arrest, does not thereby make himself liable in an action for illegal arrest." *Burns v. Erben*, 1 Robt. 555.

Where, however, a private person induces an officer to arrest another without a warrant, and without an offence having been committed in the view of the officer, he will be liable for false imprisonment unless he justifies by showing that the charge was well founded. *Taaffe v. Slevin*, *supra*; *Rose v. Leggett*, 61 Mich. 445; *McGarrahan v. Lavers*, 3 Atl. Rep. (R. I.) 592; *Collett v. Foster*, 2 Hurl. & N. 356; *Griffin v. Coleman*, 4 Hurl. & N. 265; Cooley Torts (2d ed.), 202.

The answer in the present case was good for two reasons: (1) Because it shows that the plaintiff was arrested for violating an ordinance of the city of Evansville, and that the charge upon which he was arrested was well founded. (2) Because it distinctly charges that the arrest was made by a police officer for an offence alleged to have been committed

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in the view and presence of the officer whose duty it was to make the arrest. If either hypothesis be proved the appellant is not liable. If the latter is proved he is not liable, even though the charge was not well founded.

The judgment is reversed, with costs.

Filed March 15, 1889.

No. 13,547.

CLDENING v. OHL.

SHERIFF'S SALE.—Mistake.—Sale of Wrong Land.—Trespass.—Waste.—Injunction.—A purchaser at sheriff's sale of land sold by mistake acquires no title to the land intended to be sold and can convey none, and his grantee in taking possession thereof is a trespasser, and a subsequent purchaser from the judgment defendant may enjoin the commission of waste by him.

SAME.—Notice of Mistake.—Fraudulent Conveyance.—Neither the fact that the purchaser from the judgment defendant bought with notice of the judgment lien and of its satisfaction by mistake, nor the fact that the land was conveyed by such judgment defendant to defraud his creditors, will defeat the suit for an injunction.

From the Clinton Circuit Court.

S. O. Bayless, W. H. Russell and F. F. Moore, for appellant.
T. H. Palmer and W. F. Palmer, for appellee.

OLDS, J.—This is a proceeding for a temporary restraining order and a perpetual injunction. Appellee filed his complaint against the appellant, alleging that he was the owner of the following described real estate situate in Clinton county, Indiana, to wit: Thirteen acres off the south end of the east half of the northwest quarter of section twenty-eight, in

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township twenty-two north, of range two west; that said lands have growing upon them a large quantity of timber, mostly sugar trees suitable for a sugar orchard, and as such orchard are peculiarly valuable; that the defendant is now cutting and destroying said timber and sugar trees, and is threatening to continue so to cut and destroy said timber and trees, to the irreparable damage of said lands and of this plaintiff; that defendant is insolvent, having no property subject to execution; that an emergency exists for the granting of a restraining order to restrain the defendant from cutting said timber and trees, thus denuding said lands and injuring them thereby; that defendant may cut all of said trees before a restraining order could be issued if time be given for notice. Prayer for a temporary restraining order, and on final hearing for a perpetual injunction enjoining defendant from cutting the timber or in any way interfering with the same or said lands.

Appellant demurred to the complaint for the reason that the same does not state facts sufficient to constitute a cause of action. The court overruled the demurrer, to which ruling appellant excepted. Appellant then filed an answer in three paragraphs. Afterwards, appellant filed a paragraph of answer designated an amended third paragraph. Appellee filed a demurrer to the amended third paragraph of answer, and pending the demurrer appellant withdrew the first and second paragraphs of answer, leaving the third amended paragraph as the only answer in the case. The court sustained the demurrer to the amended third paragraph, to which ruling of the court appellant excepted.

The amended third paragraph of answer alleges that, on August 30th, 1878, one Isaac S. Earhart obtained a judgment against James Clendening, Sr., before a justice of the peace of Clinton county, for \$66.48; that the said Earhart caused a transcript of said judgment to be filed in the office of the clerk of the Clinton Circuit Court and an execution to be issued on said judgment to the sheriff of said county; that at

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the date of the filing of said transcript in the clerk's office, said James Clendening, Sr., was the owner of the land described in the complaint; that said sheriff intended to levy said execution on the real estate described in the complaint, but by mistake levied upon, advertised, and sold another and entirely different tract of land. The description of the land levied upon, sold and conveyed described another tract of land from that described in the complaint, and the execution plaintiff, Isaac S. Earhart, became the purchaser thereof at such sale for the sum of \$124.55, the amount of principal, interest and costs due upon said judgment, and the sheriff issued a certificate to Earhart for the lands sold, and the lands not being redeemed at the expiration of one year, a deed was issued by said sheriff to Earhart for the land. That afterwards, on the 14th day of March, 1885, said Earhart sold, and by quitclaim deed conveyed, the land so purchased by him at sheriff's sale to Elizabeth E. Clendening, the wife of defendant, who, with the defendant, her husband, took possession of the lands described in the complaint, and have held possession ever since, the wife of the defendant claiming to be the owner thereof; that after the filing of said transcript in the clerk's office of the Clinton Circuit Court, and after it became and was a lien upon the land described in the complaint, the said James Clendening, Sr., conveyed the land described in the complaint to his wife, Sarah Clendening; that said conveyance from Clendening, Sr., to his wife was made for the purpose of defrauding the creditors of said Clendening, Sr., and was without any consideration, and said Clendening, Sr., and wife conveyed said real estate to the plaintiff; that said conveyance to plaintiff was made after Elizabeth E. Clendening was in possession of said real estate, and said plaintiff had full and actual knowledge and notice of Elizabeth E. Clendening's possession, and of the sheriff's sale and conveyance to Earhart, and from him to said Elizabeth E. Clendening as aforesaid. And it is further averred that he believes said conveyance was made to the plaintiff without any consider-

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ation, and in pursuance of an agreement and conspiracy between plaintiff and James Clendening, Sr., and his wife, with the intent and purpose of defrauding said Elizabeth E. Clendening of her legal and equitable interest in the said real estate; that the only interest the plaintiff has in said land, if he has any, which defendant denies, he derives by virtue of said conveyance to him as aforesaid; that the acts done by the defendant on said land, as complained of, were done with the counsel and express direction of his wife, with her authority and as her agent, and for her use and benefit.

The rulings of the court on the demurrer to the complaint and answer are assigned as error. The complaint is sufficient, and the demurrer was properly overruled. *Thatcher v. Humble*, 67 Ind. 444.

The answer, if good, must be so upon the theory on which it is pleaded, which is that the wife of the defendant derived some title to the real estate described in the complaint, through the sheriff's sale to Earhart and the conveyance by Earhart to her, which entitled her to possession, and that plaintiff derived no title to the real estate by virtue of the conveyance of James Clendening and wife to him. The denial of plaintiff's title is a mere denial that plaintiff took any title to the land by the conveyance, and can not be treated as a general denial of the plaintiff's title so as to constitute a good answer. To treat it so would be entirely inconsistent with the theory upon which the paragraph is pleaded.

The sheriff levied upon, sold and conveyed another and different tract of land; this conveyance passed no title whatever to the land described in the complaint, and gave no right of entry to the purchaser, and the purchaser deriving no title, he could convey none to the wife of the defendant; hence she had no authority to enter upon the land described in the complaint, and such entry would be without right and unlawful. 2 Freeman Ex. (2d ed.), section 281; Tiedeman Real Prop., section 696; Rorer Judi. Sales (2d ed.), section 99; *Frazier*

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v. *Steenrod*, 7 Iowa, 339; *Rogers v. Abbott*, 37 Ind. 138; *Keepfer v. Force*, 86 Ind. 81; *Angle v. Speer*, 66 Ind. 488; *Souders v. Jeffries*, 107 Ind. 552.

The transfer of the land by James Clendening, Sr., and wife to plaintiff, with notice on the part of the plaintiff of the judgment lien and of its having been satisfied by a mistake and sale of property not owned by the judgment defendant, would not affect the right of the owner of the judgment to have the satisfaction set aside and the judgment enforced against the judgment defendant by sale of the land in question. From the allegations in this paragraph of answer it does not appear but that the judgment defendant owned the real estate described in the sheriff's levy, notice, certificate and deed, and a good title may have passed to Earhart by his purchase at sheriff's sale and he have conveyed the good title to such tract to the wife of defendant. If, as alleged in the answer, James Clendening, Sr., conveyed to his wife the land in question for the purpose of defrauding his creditors, and he and his wife afterwards conveyed the same to the plaintiff, as alleged in the answer, it could not be questioned by the defendant by an answer in these proceedings. It does not appear from the answer that the defendant was at any time a creditor of James Clendening, Sr., and the fraud, if any fraud was committed, in no way affected him; he was a trespasser upon the land.

The paragraph of answer was clearly bad, and the court did not err in sustaining the demurrer.

Judgment affirmed, with costs.

Filed March 15, 1889.

Crow et al. v. The Board of Commissioners of Warren County.

No. 13,599.

CROW ET AL. v. THE BOARD OF COMMISSIONERS OF WARREN COUNTY.

COUNTY COMMISSIONERS.—*Ministerial Acts.*—The board of county commissioners in determining upon a change in the location of county buildings and in settling matters incidental thereto, acts in a ministerial and not in a judicial capacity.

SAME.—*Location of County Buildings.—Removal and Reconstruction.—Fraud.—Injunction.*—The board of commissioners may contract for the removal of the county court-house and jail to a new site and for their reconstruction thereon, or for the sale of the old buildings and the erection of new ones upon a different site, and its action can be questioned only when there is an abuse of discretion amounting to fraud.

SAME.—*Sale of County Property.—Notice.*—Where the board of commissioners enters into a contract, whereby the contractor is to remove the old county buildings to a new site and provide all materials that may be required to reconstruct them, in addition to that which the old buildings will furnish, there is no sale of the old buildings to the contractor, within the meaning of section 4248, R. S. 1881, and the notice of sale therein provided for is not necessary.

From the Warren Circuit Court.

T. F. Davidson, W. C. Wilson and W. L. Raybourn, for appellants.

C. V. McAdams, J. McCabe, E. F. McCabe and W. P. Rhodes, for appellee.

BERKSHIRE, J.—This is an action for an injunction by the appellants, who are voters and taxpayers of Warren county, Indiana, against the appellee. There are several errors assigned, but they all relate to the action of the court in sustaining the demurrers to the complaint and amended complaint.

The original complaint was filed on the 25th day of May, 1886, and contained but one paragraph; on the 14th day of June, by order of the court, summons issued. On the 19th

118	51
123	542
118	51
130	8
118	51
131	372
118	51
136	579
118	51
141	527
142	552

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day of July, 1886, an *addendum* was added to the complaint, and it was then verified. On the 23d day of July, 1886, a temporary restraining order was granted. Afterwards Judge Rabb, the judge of the Warren Circuit Court, for legal reasons, declined to take further jurisdiction of the action, and appointed the Hon. Lewis C. Walker, one of the judges of the Marion Superior Court, to hear and decide the application for a temporary injunction then pending, who assumed jurisdiction at chambers, whereupon the appellee filed a demurrer to the complaint, and, after hearing argument, Judge Walker, on the 30th day of July, 1886, sustained the demurrer and dissolved the temporary restraining order theretofore granted, and the appellants reserved an exception. On the 11th day of October, 1886, the appellants filed an amendment to their original complaint, and also filed an additional paragraph. To the original paragraph of complaint as amended, and to the second or additional paragraph thereof, the appellee filed its demurrer, and on the 5th day of November, 1886, the court sustained said demurrer to each of said paragraphs of complaint, and the appellants reserved an exception.

The paragraphs of complaint are lengthy, and we do not feel called upon to set them out or state in detail their substance; it is sufficient to state that the original paragraph averred that the appellee, in its corporate capacity, and in trust for the people of the county, was the owner of a certain block of ground, or public square, on which were located a court-house, county jail and jailor's residence; that the court-house was erected in the year 1870 at a cost to the people of the county of \$60,000, and that the same was ample for all the purposes and uses of a court-house. At the March session, 1886, the board, having theretofore contracted for grounds in another part of the town for that purpose, made an order for the removal of the court-house and jail from the old site and their reconstruction upon the new, and directed

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the county auditor to advertise for bids for the removal and rebuilding of said buildings.

Afterwards, and at a special session of the board held on the 31st day of March, 1886, R. P. Daggett and James O. Wright were appointed architects to prepare plans and specifications for the removal and reconstruction of said buildings, and to superintend their removal and reconstruction. At a special session of the board, held April 14th, 1886, it adopted plans and specifications submitted by said architects, and directed that notice be given by the auditor for the sale of the old site, reserving the court-house and jail, and the right to remove the same, and that notice be given that sealed bids would be received for the removal and reconstruction of said buildings.

In the original order for the removal and reconstruction of the court-house and jail, the board states certain reasons whereby it becomes necessary to change the site and rebuild or reconstruct (to follow the language employed in the order). The appellants controvert the reasons given by the board in the order for its action, and allege that the recitals therein are mere pretences and that the board acted in bad faith. But, after all, the averments in the complaint only show that there was a difference of opinion between the board and the appellants as to the propriety of the removal and the rebuilding on the new site.

The adjectives that are employed or epithets applied to the action of the board do not add strength to the averments of fact, and, after all, the facts that are averred must be looked to in determining whether or not the board acted fraudulently. The facts pleaded do not disclose any bad faith or abuse of discretion on the part of the board or its members. It is not shown that between the members of the board, or between them and others, there were any acts of bad faith whereby the county would suffer loss. As already stated the most that is disclosed is, that there was a difference of opinion between the appellants and the board as to the pro-

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priety of the removal and reconstruction of the county buildings. In what the board did it acted in a ministerial and not in a judicial capacity. *Platter v. Board, etc.*, 103 Ind. 360; *O'Boyle v. Shannon*, 80 Ind. 159; *Shannon v. O'Boyle*, 51 Ind. 565; *City of Terre Haute v. Terre Haute Water-Works Co.*, 94 Ind. 305. The board of commissioners had the right and power to contract for the removal of the court-house and jail to the new site, and for their reconstruction thereon, or to sell the old buildings and erect new ones upon the new site, and though they may not have acted wisely, if there was not an abuse of discretion amounting to fraud the action of the board can not be questioned. See the cases cited above and the authorities therein mentioned.

The notice given to the public for bids included the removal of the old buildings, and the furnishing of all necessary material in addition to the material that the old buildings would furnish, and bids were received and the contract let on those terms.

Section 4248, R. S. 1881, reads thus: "The board of county commissioners shall not be authorized to sell any county property, either real or personal, except at public auction, after advertising said property for sale sixty days, giving the terms, time, and place of sale, and a description of the property to be sold."

This court has held that in the sale of county property by the board this statute must be strictly complied with. *Platter v. Board, etc.*, *supra*, and cases cited.

It is contended by the appellants that when the board let the contract, the contractors to remove the old buildings and to furnish all material required in addition to the material that the old buildings would furnish, that was in effect a sale of the old buildings to the contractors, and in violation of the statute.

We do not so understand it. The old buildings, and the materials furnished therefrom, at all times remained the property of the county, and went into the new build-

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ings as its property. The contract as let was to erect and complete the new buildings, using the material of the county so far as it would go. Suppose the county had had 100,000 bricks on hand when the contract was let, will it be contended that the board could not have let the contract, the contractor furnishing all material except the bricks to be furnished by the county, and that before the bricks could be used they would have to be advertised and sold, as provided in the foregoing statute? We apprehend not. What we have said, and the conclusion reached, apply as well to the second as to the first paragraph. We find no error in the record.

Judgment affirmed, with costs.

Filed March 15, 1889.

118	55
118	293

No. 13,616.

MITCHELL v. WEAVER.

SHERIFF'S SALE.—Excessive Judgment.—Reformation After Sale.—Damages.—Implied Contract.—Where a judgment creditor bids the full amount of his judgment and costs for land subject to the lien, pays the costs and receipts the sheriff for the remainder of his bid, and, after notice of the filing of a complaint to correct the judgment, demands and receives a sheriff's deed to the land and asserts title thereunder, the owner of the land, upon affirming the sale, may recover from him, as upon an implied contract, the difference between the amount of his bid and the amount of the judgment as corrected.

From the Morgan Circuit Court.

J. H. Jordan and *O. Matthews*, for appellant.

W. R. Harrison, *G. A. Adams* and *J. S. Newby*, for appellee.

Mitchell v. Weaver.

ELLIOTT, C. J.—It is alleged in the complaint of the appellee that, on the 18th day of April, 1881, Abraham Weaver was the owner of a tract of land; that he mortgaged it on that day to Samuel M. Mitchell to secure a debt of \$6,500; that he agreed with the appellee, in consideration that she would join with him in the mortgage, to convey the land to her, subject to the mortgage; that he did convey the land to her on the 21st day of April, 1881; that the deed executed on that day was lost; that, on the 17th day of November, 1885, he executed to her a deed in lieu of the one which had been lost, and that this last deed was recorded; that on the 29th day of November, 1884, Mitchell instituted a suit to foreclose his mortgage, and secured a judgment for \$8,461 and a decree of foreclosure; that, on the 3d day of January, 1885, the land was sold upon the decree; that Mitchell bid for it \$8,638.76, and received a certificate from the sheriff; that Mitchell paid the sheriff \$173.67, the costs of the suit and sale, and receipted to him for the remainder of the judgment; that, on the 16th day of February, 1885, Abraham Weaver and others filed a complaint to correct the judgment; that, notwithstanding the fact that Mitchell had notice of the filing of that complaint, and that the judgment was rendered for \$760 more than was owing him, he demanded and procured from the sheriff, on the 3d day of January, 1886, a deed for the mortgaged premises, and by virtue of the deed asserts title to the land and claims possession, although he knew that it had been conveyed to the appellee; that Mitchell has never paid any part of his bid except \$173.67, and that the appellee has demanded of him the sum of \$744.17, which he refuses to pay; that, on the 17th day of February, 1886, an order was duly entered correcting and reforming the judgment rendered in favor of Mitchell, and it was adjudged that the judgment entered in his favor exceeded the amount due him in the sum of \$744.17. It is also alleged that the land embraced in the mortgage was of

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the value of \$12,000. To this complaint Mitchell unsuccessfully demurred.

The decision of the trial court reforming the original judgment is conclusive as against any collateral attack, and is, of course, conclusive here, but it does not adjudicate the issue joined in this case. The issue here is, whether the appellee has a right to a judgment for money against the appellant, and not whether the original judgment was wrong.

The appellee can only recover upon the cause of action stated in the complaint, and in accordance with the theory on which it proceeds. *Feder v. Field*, 117 Ind. 386; *Moorman v. Wood*, 117 Ind. 144; *Mescall v. Tully*, 91 Ind. 96. The question, therefore, is not what relief the appellee may have, but whether she can secure any relief under the complaint as it is constructed. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250; *Supreme Lodge, etc., v. Knight*, 117 Ind. 489. The only relief, if any, which she can be awarded, under the theory adopted and the remedy chosen, is a judgment for damages, and if she is not entitled to that relief the complaint is bad.

In order to entitle her to recover damages it must appear that the appellant, Mitchell, has committed an actionable wrong by violating an express or an implied contract.

There was no express contract between the parties. Mitchell did not promise to pay the appellee any money or to do any act. If, therefore, there is no implied contract there can be no recovery, and the question is, was there an implied contract? We think that the facts stated in the complaint are such as authorize the conclusion that there was such a contract. The appellant bid a specified sum for the land, he demanded and received a deed after notice of the filing of the complaint to reform the judgment, and he asserts title under his deed to land which he knew was owned by the appellee, and is of the value of \$12,000. Upon the facts confessed by the demurrer, he can not hold the land without paying the amount of his bid, for the amount in excess of his judgment belongs to the owner of the land. As he has

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elected to hold the land, and the appellee has elected to part with title and hold him to his bid, equity requires that he should pay it. She is doubtless estopped by her conduct from asserting any title, and he will, therefore, acquire a perfect title when he pays the full amount he bid for the land. The complaint does not present the question of the appellant's right to treat the sale as voidable, for he confesses that he has affirmed it and asserts title under it. As he affirms the sale and the appellee holds him to his affirmance he can not escape the payment of his bid. He can not claim title and yet refuse to pay what he promised. He must do one thing or the other, repudiate the sale or pay the full amount of his bid. He did not pay it, for he simply receipted to the sheriff, and as he receipted for \$744 more than his judgment amounted to, he has in his hands that much more money than he is entitled to, and must pay it to the person whose land he has secured. If the owner had repudiated the sale instead of affirming it, then a very different question would be presented.

We hold the complaint good.

The evidence makes a stronger case than the complaint, and as the complaint is good the finding must be right.

Judgment affirmed.

Filed March 12, 1889.

Wallace v. Mattice.

No. 13,504.

WALLACE v. MATTICE.

FRAUD.—Proof.—Instruction to Jury.—An instruction that “fraud is never presumed, but the burden rests upon one charging fraud to make it out by clear and convincing evidence,” is not open to the objection that it misled the jury by conveying an impression that fraud must be proved beyond a reasonable doubt.

PRACTICE.—Instructions.—Exclusion of Evidence.—Bill of Exceptions.—No available error can be predicated upon the refusal to give instructions or the exclusion of evidence, unless all the evidence is brought into the record by a bill of exceptions, or unless the applicability of the instructions or the materiality of the evidence is otherwise properly shown.

From the Fulton Circuit Court.

J. H. Bibler, M. L. Essick and O. F. Montgomery, for appellant.

J. Rowley, M. A. Baker, G. W. Holman and — Corbin, for appellee.

MITCHELL, J.—This was an action of replevin commenced by Edmund Mattice against Robert C. Wallace, sheriff of Fulton county. The controversy involved the ownership and right to the possession of certain personal property which had been transferred to Julius Rowley by Solomon Wagoner, the plaintiff having, as he claimed, purchased it from Rowley. The property had been seized by the sheriff to satisfy an execution issued on a judgment, rendered by the Fulton Circuit Court against Wagoner and another, in favor of John E. Gordon. The transfers from Wagoner to Rowley, and from the latter to Mattice, were assailed as having been made in bad faith and in fraud of the rights of Wagoner’s creditors. There was a verdict and judgment for the plaintiff in the court below.

The court, having stated the nature of the issues in previous instructions, told the jury that “fraud is never pre-

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197	568
118	59
136	687
118	59
139	609
118	59
154	89
156	402

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sumed, but the burden rests upon one charging fraud to make it out by clear and convincing evidence." For the appellant it is now argued that this instruction must have misled the jury, because it conveyed the impression that fraud must be proved beyond a reasonable doubt. The instruction is not obnoxious to this objection.

It is well settled, as an abstract rule of law, that fraud, as a matter of fact, is never presumed; it must be clearly proved, either directly or circumstantially, by the party making the charge, for the presumption of law is always against bad faith. *Stewart v. English*, 6 Ind. 176; *Hunt v. Elliott*, 80 Ind. 245. It is quite true that fraud is a question of fact for the jury, and that it may be inferred from circumstances and need not be proved by direct or positive evidence. But it is nevertheless proper for the court to direct the attention of the jury to the character of the issue, and to remind them, when it involves fraud, turpitude or crime, that the presumption of law is against the charge, and that to overcome the presumption and establish the charge convincing or satisfactory evidence is required. Nothing more than this was done in the present case. This does not vitiate the rule that a preponderance of the evidence is all that is required to maintain the affirmative of the issue in a civil case, nor does it require that the jury must be satisfied beyond a reasonable doubt. *Continental Ins. Co. v. Jachnich*, 110 Ind. 59.

The appellant complains of the refusal of the court to give an instruction asked by him, and it is also contended that the court erred in the exclusion of certain evidence offered by the appellant. An examination of the bill of exceptions makes it apparent that material portions of the evidence are wholly omitted, and that the bill only contains an abstract of the evidence introduced. It is authenticated as follows: "Substantially, this was all the evidence in the cause." This was not a proper authentication, and does not bring the evidence into the record. 2 Works Pr., section 1078. Where

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complaint is made of the refusal of the court to give instructions, the party complaining must make it appear that there was evidence in the record to which the instructions refused were applicable. This can only be done by incorporating the evidence into a proper bill of exceptions, or by some other authorized statement of the court, showing the materiality of the instructions asked, or that they were applicable to the evidence in the case. *Hunt v. Elliott, supra.*

As we have seen, the bill of exceptions purporting to contain the evidence is not properly authenticated, nor does it profess to contain all the evidence; neither is there any statement by the court which enables this court to apprehend the question involved, or which shows that there was evidence to which the instruction was applicable. For the same reasons, the points predicated upon rulings of the court in sustaining objections to certain questions asked of witnesses by appellant are not presented by the record. In the absence of the evidence we are unable to say that the answers to the questions to which objections were sustained would have been material.

The record presents no error, and the judgment is therefore affirmed, with costs.

Filed March 12, 1889.

No. 13,583.

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118	61
151	498
151	499

PARENT AND CHILD.—*Contract of Third Person to Support Child.*—One who has contracted with the father of a minor child, for a stipulated money consideration, to keep the child in his family and in all respects to provide and care for her, is liable to the father, if, in violation of his contract, he causes her to be confined in the county poor-house, where she dies.

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SAME.—*Subsequent Insanity of Child.*—The fact that after the defendant had kept the child in his family for a time she became insane and difficult to control might have entitled him to a rescission of the contract, but it is not a defence to an action for a breach, it being his duty to prepare a suitable place to keep her.

SAME.—*Breach of Contract.—Measure of Damages.*—The defendant having complied with his contract for a time, the plaintiff is not entitled to recover back the entire consideration paid, but the measure of damages is the difference in value between the care and treatment the child actually received and that called for by the contract.

SUPREME COURT.—*Instructions to Jury.--Consideration of.*—Where all the instructions given by the court are not in the record, instructions refused will not be considered on appeal; but if an instruction given appears in the record it will be considered, if it is so erroneous that it could not be cured by the giving of other instructions.

From the Montgomery Circuit Court.

W. H. Thompson and J. West, for appellant.

G. W. Paul, M. D. White and J. E. Humphries, for appellee.

COFFEY, J.—On the 1st day of March, 1881, the appellant entered into a written agreement with the appellee by the terms of which the appellant, for the consideration of four hundred dollars, agreed to keep in his own family, take charge of and maintain at his own expense, the infant daughter of the appellee during her natural life. By the terms of the agreement the appellant was to keep her in his own family as one of his children, to provide her with suitable food, clothing, schooling and medical attention, should she require it, and in case of her death to pay her funeral expenses.

It is averred in the complaint as a breach of this contract, substantially, that the appellant did not keep said daughter in his possession at his home as one of his children; that he did not during her lifetime provide her with suitable food and clothing, medical attention and schooling, and did not keep her at his own house as a member of his family, but on the contrary, without the knowledge or consent of the appellee, and without the consent of said daughter, he took her to the poor-house of the county, where she was permitted

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to remain until her death. The complaint consists of two paragraphs, but the legal effect of both is the same.

The appellant filed a demurrer to the complaint, alleging that the same did not state facts sufficient to constitute a cause of action, but the demurrer was overruled and he excepted.

The appellant then filed an answer in two paragraphs. The first is pleaded in mitigation of damages and alleges, substantially, that the daughter of the appellee, named in the contract set out in the complaint, after she had been kept by the appellant for about two years, became seriously sick and diseased and afflicted with epileptic disorder, and thereby became deranged in her mind, and was from that time forward to the day of her death unable to control herself, and was insane and was a source of constant danger to herself and all persons about her; that defendant tried in every way possible to protect her from danger of self-destruction, but found it impossible to keep her from throwing herself into the fire and in many other ways mutilating and destroying herself; that she became so deranged and wild in her mind that it was impossible, with the means that could be used at the home of the defendant, to care for and protect her as was necessary, and the defendant, after exhausting every means available, endeavored to find some one who could control and protect said child, but could obtain no one; that not only was said child a constant danger to herself by reason of her insanity and the unreasoning wilfulness of her acts, but unless constrained, guarded and withheld she would set fire to the furniture, beds and curtains, and to the house in which the appellant lived; that though said child had grown to be a large girl, almost full-grown, she was so diseased and deranged in her mind that she would, unless withheld and violently restrained, tear off her own clothing in the presence of men and thereby bring shame and humiliation upon herself and upon the appellant and his family; * * * that finding that the home of appellant was not a safe or proper place to longer keep said child, and that she could be better

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and more safely cared for and guarded, appellant took said child to the county asylum and placed her therein, with instructions for her to be carefully attended upon, and in all respects well and carefully protected; that she was so kept at said asylum for the period of nine months, when, by reason of the continuance and increasing violence of her sickness and disease, she died; that appellant attended to furnishing and paying for her funeral expenses, and she was decently and properly cared for and given respectable burial.

The second paragraph avers the same facts set out in the first, but they are pleaded in this paragraph as a bar to the cause of action set up in the complaint.

The court sustained a demurrer to the second paragraph of this answer and the appellant excepted.

The appellee replied by way of a general denial to the first paragraph of the answer, and the cause, being at issue, was tried by a jury, who returned a verdict for the appellee. Over a motion and reasons for a new trial, the court rendered judgment on the verdict.

The appellant assigns in this court, as error, that the court erred in overruling the demurrer of the appellant to the first and second paragraphs of the complaint; that the court erred in sustaining the appellee's demurrer to the second paragraph of the appellant's answer; that the court erred in overruling the appellant's motion for a new trial.

The appellant argues that the complaint does not state a cause of action in favor of the appellee because the contract in suit was made for the benefit of the daughter, and that, if any cause of action existed for its breach, it should be enforced in favor of the daughter and for her benefit alone.

We can not agree with the appellant in this position. It is true that the contract was, in one sense, for the benefit of the daughter, but the appellee, as the father, was bound by law to support his infant daughter, and the appellant, having contracted with him, for a valuable consideration, to perform that legal duty, was liable to him for any breach of that con-

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tract. In our opinion each paragraph of the complaint states a good cause of action.

The second paragraph of the answer admitted a breach of the contract set out in the complaint, and as it gave no legal excuse for such breach it was bad. The court, therefore, did not err in sustaining the demurrer of the appellee addressed to that paragraph. As the appellant had expressly covenanted to keep the daughter in his family, when she became insane it was his duty, if he had no suitable place to keep her, to prepare one. He had no legal right to confine her in the county asylum amongst the common paupers. Indeed, with the contract in suit in her favor, she could in no sense be considered a pauper, and it was illegal to confine her at a place where none but that class could be lawfully admitted.

The appellant claims that the court erred in its instructions to the jury, and also in refusing to give certain instructions asked by him. It is contended by the appellee that it does not affirmatively appear that all the instructions given by the court are in the record, and that, therefore, no question relating to the instructions can be considered by this court.

After a careful consideration of the bill of exceptions we find that it sustains the contention of the appellee. It does not appear that the court was requested to instruct the jury in writing, nor does it appear that all the instructions were in fact written. Those set out in the bill were not signed by the judge, nor is there any statement found in the bill, or in any other part of the record, from which it can be inferred that all the instructions given by the court are here for our consideration. In this state of the record we can not consider the instructions asked by the appellant and refused by the court. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Newcomer v. Hutchings*, 96 Ind. 119. But it does not follow that, because it does not appear that all the instructions given by the

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and more safely cared for and guarded, appellant took said child to the county asylum and placed her therein, with instructions for her to be carefully attended upon, and in all respects well and carefully protected; that she was so kept at said asylum for the period of nine months, when, by reason of the continuance and increasing violence of her sickness and disease, she died; that appellant attended to furnishing and paying for her funeral expenses, and she was decently and properly cared for and given respectable burial.

The second paragraph avers the same facts set out in the first, but they are pleaded in this paragraph as a bar to the cause of action set up in the complaint.

The court sustained a demurrer to the second paragraph of this answer and the appellant excepted.

The appellee replied by way of a general denial to the first paragraph of the answer, and the cause, being at issue, was tried by a jury, who returned a verdict for the appellee. Over a motion and reasons for a new trial, the court rendered judgment on the verdict.

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We can not agree with the appellant in this position. It is true that the contract was, in one sense, for the benefit of the daughter, but the appellee, as the father, was bound by law to support his infant daughter, and the appellant, having contracted with him, for a valuable consideration, to perform that legal duty, was liable to him for any breach of that con-

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The second paragraph of the answer admitted a breach of the contract set out in the complaint, and as it gave no legal excuse for such breach it was bad. The court, therefore, did not err in sustaining the demurrer of the appellee addressed to that paragraph. As the appellant had expressly covenanted to keep the daughter in his family, when she became insane it was his duty, if he had no suitable place to keep her, to prepare one. He had no legal right to confine her in the county asylum amongst the common paupers. Indeed, with the contract in suit in her favor, she could in no sense be considered a pauper, and it was illegal to confine her at a place where none but that class could be lawfully admitted.

The appellant claims that the court erred in its instructions to the jury, and also in refusing to give certain instructions asked by him. It is contended by the appellee that it does not affirmatively appear that all the instructions given by the court are in the record, and that, therefore, no question relating to the instructions can be considered by this court.

After a careful consideration of the bill of exceptions we find that it sustains the contention of the appellee. It does not appear that the court was requested to instruct the jury in writing, nor does it appear that all the instructions were in fact written. Those set out in the bill were not signed by the judge, nor is there any statement found in the bill, or in any other part of the record, from which it can be inferred that all the instructions given by the court are here for our consideration. In this state of the record we can not consider the instructions asked by the appellant and refused by the court. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Newcomer v. Hutchings*, 96 Ind. 119. But it does not follow that, because it does not appear that all the instructions given by the

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court are in the record, this court will not consider those which do appear. Where all the instructions are not before this court, we can not consider instructions asked and refused, because the presumption obtains that, if they state the law applicable to the case, they were given in some other instruction. But where an erroneous instruction appears in the record, if it be erroneous to such a degree that it could not be cured by some other instruction, this court can see that the party against whom it was given has been injured, and will, therefore, consider such erroneous instruction. *Coryell v. Stone*, 62 Ind. 307.

The fifth instruction given by the court is as follows: "If the facts to which I have called your attention have been proved by a preponderance of the evidence, then the plaintiff is entitled to recover, and the measure of his recovery will be the amount paid by the plaintiff, with interest thereon at six per cent. per annum from the date of payment to the present time."

It is contended by appellee that the contract in suit is an entirety, and that the money paid the appellant was paid upon a condition subsequent, and a failure to comply with the terms of the contract gave the appellee a right to recover back the full consideration paid by him.

We are unable to agree with the appellee in his view of the law. The law does not favor conditions subsequent, because they tend to destroy estates, and where words of doubtful meaning are used, they will be construed as constituting a covenant rather than a condition. There are no words of condition in the contract in suit. In this case the appellant had fully complied with the contract for nearly two years. Under this state of the case it is not competent for the appellee to sue for and recover the entire consideration paid by him by reason of the failure of the appellant to comply with the contract for the period of nine months.

It is not necessary for us to decide what would be the rule of damages if the daughter were yet living. Under this

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contract the appellee had the right to have his daughter kept in the family of the appellant, fed, clothed, taken care of as one of his own family and furnished with proper medical treatment. It is true that a state of facts arose after the execution of the contract which was not in the contemplation of the parties at the time, and which, perhaps, would have entitled the appellant, upon a proper application, to rescind the contract; but as he took no steps in that direction, he must be held to the contract as it is written.

In our opinion the proper measure of damages, as applicable to the case, is the difference in value between the care and treatment the daughter actually received and that called for by the contract. Such a rule would fully compensate the appellee, so far as money can compensate him for the breach of the contract, and would at the same time require the appellant to make good his breach of the contract.

As no denial was pleaded, the court did not err in instructing the jury that if they returned a verdict at all it must be for the plaintiff.

For the error of the court in giving instruction number five the cause must be reversed.

Cause reversed, with instructions to the circuit court to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed March 12, 1889.

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118	68
133	379
118	68
143	22

No. 13,651.

THE BOARD OF COMMISSIONERS OF ST. JOSEPH COUNTY
v. THE SOUTH BEND AND MISHAWAKA STREET RAIL-
WAY COMPANY.

CONTRACT.—*Guaranty Deposit.*—*Agreement to Refund.*—Where a street railway company is given permission by the board of county commissioners to lay its track along a public highway, and is required to deposit in the county treasury a certain sum of money, which is to be repaid upon the performance by it of certain conditions, it can only recover the money so deposited by showing a performance of the conditions, or a legal excuse for not doing so.

SAME.—*Onerous Conditions.*—*Excuse for Non-Performance.*—The fact that the performance of the stipulated conditions by the railway company will put it to great inconvenience and cause it a large outlay of money, is not a sufficient excuse for the non-performance of its agreement.

From the St. Joseph Circuit Court.

T. E. Howard and *A. Anderson*, for appellant.

L. Hubbard and *E. V. Bingham*, for appellee.

BERKSHIRE, J.—This was an action by the appellee to recover from the appellant the sum of \$500.

On March 11th, 1885, the appellant granted to the appellee the right to lay a street railway on the highway south and west of the St. Joseph river, from South Bend to Mishawaka, upon certain conditions, one of which was that the appellee would pay into the treasury of St. Joseph county the sum of \$500 within thirty days, said sum to be repaid to the appellee when the conditions were all complied with by the appellee.

At the request of the parties the court made a special finding. To the conclusions of law the appellant excepted, and the court gave judgment for the appellee for the sum of \$500 and costs.

There is but one error assigned, which is as follows: That the court erred in its conclusions of law on the facts found.

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The following is the special finding, as made by the court :

“ That the South Bend Street Railway Company, on or before the 11th day of March, 1885, had applied to the defendant, the board of county commissioners of St. Joseph county, Indiana, for leave to lay a street railway track on a public highway on the north side of the St. Joseph river, from South Bend to Mishawaka, not in the corporate limits of any town or city, which permission was granted and an order made by the defendant in such matter, in the terms following :

“ ‘ Eighth day, March 11, 1885.

“ ‘ In the matter of the petition of the South Bend Street Railway Company to extend said railway :

“ ‘ Now comes the South Bend Street Railway Company and presents to the board their petition in the words and figures following, to-wit: (Insert.) And said petition being heard, on motion of the Board, it is

“ ‘ *Resolved*, That the South Bend Street Railway be and is hereby authorized to lay down and operate a street railway on the public highway, next north of the St. Joseph river, between the easterly limits of the city of South Bend and the westerly limits of the town of Mishawaka, on the conditions, to-wit :

“ ‘ 1st. Thirty days from the passage of this resolution it shall pay into the treasury of St. Joseph county the sum of \$500, the same to be a part of the funds of this county : *Provided*, however, that in case the said street railway shall be complete and in actual operation as hereinafter provided, on or before the 1st day of January, 1886, then and in such event, and not otherwise, said sum of money shall be repaid to said company.

“ ‘ 2d. The cars to be used on the track of said company shall be operated by animal power only, and shall be used only to carry passengers and their baggage, and material for constructing and repairing tracks, and shall be of the best style and material, and the price for carriage of passengers

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between Mishawaka and South Bend not more than ten cents per trip for each passenger, and not more than fifteen cents for the round trip if round trip tickets are given.

“ ‘3d. The track shall be laid level with the surface of the highway when laid thereon, and shall conform to the grade thereof in such a manner as in no way to impede the passage of vehicles, and with proper bridges so that the flow of water in the ditches and gutters shall be in no way hindered or impeded. The track may be laid along and close to the north and east line of the highway, outside of the raised, improved and travelled portion thereof, or it may be laid on the road-bed as worked and travelled, and in no case shall the west and south line of the track be laid within three feet of the center of the road-bed of the highway as worked and travelled; and if laid on the road-bed, then the company shall keep the space between the rails and two feet on each side outside of the rails in good order for travel, so as at all times to be on a level with the highway, and the line shall be completed by January 1st, 1886.

“ ‘4th. The track of the company shall be of the uniform gauge of four feet eight and one-half inches in width, and shall be built of the most approved material.

“ ‘5th. The cars shall not be allowed to stand on the highway unless when attached to a team and waiting for passengers.

“ ‘6th. This covenant and permit is to be void unless the said company complies with the foregoing provisions and has the said street railway completed and in actual operation for the whole length of the line on or before the 1st day of January, 1886.’

“ That the plaintiff, desiring to lay a street railway on the same highway mentioned in the foregoing order, and also on the highway first south of the St. Joseph river, between South Bend and Mishawaka, filed a petition in the following terms with the defendant, to wit:

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“ ‘To the Board of Commissioners of St. Joseph County, State of Indiana :

“ ‘GENTLEMEN—Your petitioners, the South Bend and Mishawaka Street Railway Company, would most respectfully represent that they are desirous of constructing, owning and maintaining two street railway lines, or routes of street railway, one of said routes to be located on and along the river road on the northerly side of the St. Joseph river, thus enabling said company to construct a continuous line or route of street railway, from the city of South Bend to the town of Mishawaka.

“ ‘Also a second line or route of street railway in and along Vistula highway, on the southerly side of the St. Joseph river, thus enabling your petitioners to construct a second continuous line or route from the city of South Bend to the town of Mishawaka. We therefore submit the following ordinance for your consideration.

“ ‘Yours Respectfully,

“ ‘SOUTH BEND AND MISHAWAKA STREET RAILWAY CO.

“ ‘By J. W. BOYNTON, President.

“ ‘J. H. KNIGHT, Secretary.’

“ That on the consideration of said petition, on the 11th day of March, 1885, the board of commissioners of St. Joseph county, Indiana, made the following order :

“ ‘Eighth day, March 11th, 1885. March Term.

“ ‘In the matter of the petition of the South Bend and Mishawaka Street Railway Company.

“ ‘Now comes the South Bend and Mishawaka Street Railway Company and presents to the board their petition, in the words and figures following, to wit : (Insert). And the board being fully advised it is ordered further : Resolved, That the South Bend and Mishawaka Street Railway Company is hereby authorized to lay down and operate a street railway on the same public highway, and also on the public highway next south of the St. Joseph river, and between the easterly limits of the city of South Bend and the westerly

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limits of the town of Mishawaka, on the same terms and conditions, in every respect, as the terms and conditions hereinbefore imposed on the South Bend Street Railway Company, except that the track on the north side of the St. Joseph river shall be laid on the south and west sides of the public highway, and the whole of said lines on both sides of the river shall be completed and in operation by January 1st, 1886, subject to the conditions and forfeitures aforesaid.'

"The court further finds that from the easterly limits of South Bend to the westerly limits of Mishawaka is about four miles. The ordinary width of the highways on which such railway is located is about sixty feet, and the ordinary width of the travelled portion thereof is about thirty-two feet.

"That, within the time prescribed in said order of the defendant, the plaintiff paid into the treasury of St. Joseph county, Indiana, said sum of five hundred dollars, and did proceed to construct its road on both sides of the St. Joseph river. That the said street railway on the north and east side of the St. Joseph river was completed and in operation, in all respects in compliance with the order and grant of the defendant, before January 1st, 1886.

"That, at the December term, 1885, of said board of commissioners, the plaintiff petitioned and demanded of said board that the said five hundred dollars be refunded. That thereupon the board passed the following order December 17th, 1885:

" 'In the matter of the South Bend and Mishawaka Street Railway Company, to have their five hundred dollars guarantee deposit refunded.

" 'Now comes the South Bend and Mishawaka Street Railway Company, by its secretary, J. H. Knight, and the board having considered the petition of said company heretofore filed, asking for the return of the sum of five hundred dollars deposited in the county treasury as security for the faithful construction of said street railway, according to the

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terms of the grant made by this board, which petition is in these words: (Insert.) And the members of the board having made personal inspection of said street railway, and the board being fully advised, are of the opinion that said street railway has been, in general, constructed according to the requirements of said grant, with certain exceptions as follows:

“ ‘ The board are of opinion that, whereas it was required in said grant that the track of said street railway on the south side of the St. Joseph river should be laid north and east of the middle line of the travelled portion of the highway, and not nearer than three feet thereto, yet in some places said track is laid on or south and west of the said middle line of the highway, this being particularly the case on and near the bridges on said highway south of the St. Joseph river.

“ ‘ It is therefore ordered by the board, that said street railway company, in compliance with the terms of said grant, remove their track on said bridges and elsewhere along the highway next south of the St. Joseph river, off and from all that portion of said highway and bridges south and west of the middle line of the travelled portion of the road-bed of the highway and bridges, and re-lay said track and switches so that the south and west rail of said street railway track, or of any switch or turn-out thereof, shall not be nearer than three feet at any place to said middle line of the travelled highway: *Provided, however,* That a single track may be run over said bridges on the north and east side thereof, and leaving two feet between the north and east rails and the north and east guards of said bridges, if so much is necessary for the free running of said cars.

“ ‘ It is further ordered that said street railway company, after bringing the surface of said track to an even grade with the surface of the said highway and bridges, as required by said grant, do not disturb or interfere with said highway or bridges outside their track, and two feet on each side thereof,

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further than is necessary to enable the company to comply with the terms of the grant; that they will not remove the snow from said part of said highway and bridges, or pile snow thereon on the south and west sides of said middle of said highway and bridges, the intent of this requirement being that the portion of said highway and bridges outside the said street railway track and two feet on each side thereof, including the whole of the highway and bridges south and west of a line three feet north and east of the middle line of the travelled portion of said highway and bridges, should be preserved free for the sole use of the travelling public.

“ ‘It is further ordered that as soon as the auditor becomes satisfied that said street railway company has complied substantially with the terms of the foregoing provisions of this order, liberally interpreted so as to preserve the rights and privileges of the public, then he shall draw his warrant on the county treasury in favor of the South Bend and Mishawaka Street Railway Company for said sum of \$500.

“ ‘It is further ordered that the time for the completion of said South Bend and Mishawaka Street Railway be and it is hereby extended until the 1st day of July, 1886.’

“The court further finds from the admissions of both parties, that there is a controversy between the parties only as to whether the said railway has been located according to the grant of the defendant at two places on the south and west side of the St. Joseph river, which places are known as ‘the Springbrook bridge and the approaches thereto,’ and ‘the Wenger creek bridge and the approaches thereto.’

“And the court finds the facts in such controverted matter to be as follows: At the Springbrook bridge there is a switch with a double track of 525 feet in length extending across the bridge and embankments. The bridge is 18 feet wide and 50 feet long. The south rail of the tracks, for the whole length of the switch, is south of the center of the travelled portion of the highway.

“At the Wenger creek bridge there is a switch 504 feet

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long, with double tracks of that length, and the bridge is at the center of the switch. The bridge is 16 feet wide and 50 feet long. The south rail of the track for the whole length of the switch is south of the travelled portion of the highway, and for 470 feet east of the east end of the switch the south rail is also south of the center of the travelled portion of the highway.

“The gauge of the tracks of plaintiff's railway is four feet eight and one-half inches; the cars are from seven and one-half to eight feet wide. The length of the cars ordinarily used, with teams, is thirty-four and one-half feet. The distance between the double track is three and one-half feet to four feet. Sometimes as many as five cars are on these switches at one time on fair and picnic occasions.

“The general course of the highway at the Springbrook bridge is about east and west. The bridge is set across the creek so as to make an angle with the general course of the highway, the east end of the bridge being south of the line of the highway. This makes a curve in the track necessary at this place. On the north side of the embankment on the east end of the approaches to the Springbrook bridge the road-bed descends to the north. The approaches to the Springbrook bridge are embankments on both sides, materially narrowing the highway at this bridge and the approaches to from 16 to 24 feet.

“The approaches to the Wenger creek bridge are long embankments from 18 to 24 feet wide, and the embankments and bridge form a curve in the general course of the highway. About 570 feet from the east end of the switch is a wash-out or gully cut by the water on the river bank. At this point the river encroaches on the highway, making a steep bank encroaching into the highway, which bank is about 50 feet high. The track from the east end of the switch on the east approach of the Wenger creek bridge bears to the south of the center of the travelled portion of the highway, so as to avoid the gully or washout on the river bank, and

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the north rail of the track is laid as close to the north side of the highway at the Wenger creek bridge, and east and west of the washout, as is safe for use by the travelling public.

“ The court further finds that for the successful operation of plaintiff's street railway on said highway, side-tracks or switches are necessary at intervals to allow cars to pass each other; that the plaintiff has no more switches than the ordinary travel on said street railway requires; that the switches at the Wenger creek bridge and Springbrook bridge are located at the places most convenient for the plaintiff in the operation of said street railway; that as street railways are usually built, the track must be straight at the point where the car takes the switch; that sharp curves in the track require curve irons, or tracks with a groove in the rail, or a guard raising one side of the rail to hold the car, either of which offers some impediment to public travel in vehicles, more serious than the ordinary track used on said railway; that the curves in plaintiff's track are as short as they can be operated practically at the places where laid, and the track as near to the north side of the travelled portion as it can safely be laid and practically operated, by reason of the encroachment of the river on the highway and the narrowness of the bridges and approaches thereto, in the condition of such highway at the time of the grant and construction of the railway; that at such places the railway was built so as to cause no unnecessary obstruction to travel with vehicles.

“ At the east end of the switch the south rail is six (6) feet distant from the south side of the travelled way, and the north rail is sixteen (16) feet distant from the north line of the travelled way. At the west end, where the double track commences, the south rail is seven (7) feet from the south side of the travelled way, and the north rail is nine (9) feet from the north side thereof. At a point just east of the bridge the north rail is ten and one-half ($10\frac{1}{2}$) feet from the north side of the travelled way, and the south rail is three (3)

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feet north of the south side of the travelled way. At the east end of the switch the south rail is six (6) feet from the south side of the travelled way, and the north rail is sixteen (16) feet south of the north side thereof. At a point forty (40) feet west of the west end of the switch the south rail is five (5) feet north of the south line of the travelled way, and the north rail is fifteen (15) feet south of the north line thereof, and the south rail for the whole length of the switch is south of the center highway.

“The measurements of the Wenger creek bridge are as follows: At the westerly end thereof the south rail is eleven (11) feet from the south line of the travelled way, and the north rail is eight (8) feet from the north side thereof. On the approach just west of the bridge each outside rail is four (4) feet distant from the outside of the travelled way nearest the rail. The bridge is sixteen (16) feet wide, with a span of fifty (50) feet. The switch of the double track is five hundred and four (504) feet long, the bridge being about the center thereof. At the east end of the switch the south rail is eleven and one-half ($11\frac{1}{2}$) feet from the south line of the travelled way, and the north rail is nine (9) feet from the north line of the travelled way. Twenty (20) feet east of the east end of the switch the south rail is fifteen (15) feet from the south side of the travelled way, and the north rail is twelve and one-half ($12\frac{1}{2}$) feet from the north line thereof. A road known as the Turkey Creek road strikes the highway between South Bend and Mishawaka, at a point four hundred and seventy (470) feet east of the east end of the switch, and at said Turkey Creek road the south rail is eleven (11) feet from the south line of the travelled way, and the north rail is seventeen (17) feet from the north side of the travelled way. The track here is carried to the south in order to avoid a washout of the bank of the St. Joseph river, which point is about one hundred (100) feet east of the Turkey Creek road. The gauge of the tracks is four (4) feet eight and one-half ($8\frac{1}{2}$) inches, and the cars are from seven and one-half

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(7½) to eight (8) feet wide. Sometimes as many as five cars are on these switches at one time. The length of the cars and team is thirty-four and one-half (34½) feet; the width between the double track is from three and one-half (3½) to four (4) feet. The city of South Bend lies westerly from Mishawaka, and the general course of the highway is from east to west, running parallel to and south of the St. Joseph river. At the Springbrook bridge the general course of the highway is about east and west. The bridge runs from south of east to north of west, making an angle with the general course of the highway east of the bridge.

“ That at all other places on said highway the order and grant of the defendant was complied with in all respects, in the location, construction and operation of said railway before July 1st, 1886, and from the facts stated the court finds that the said grant or order was substantially complied with at said bridges and the approaches thereto, before July 1st, 1886, by the plaintiff.

“ The court further finds that in September, 1886, plaintiff demanded of defendant the return of said five hundred dollars deposit, which demand was refused by the defendant; that at the September term, 1886, of the board of commissioners of St. Joseph county, the board made the following order, on September 10th :

“ ‘ Now comes the South Bend and Mishawaka Street Railway Company, by their attorney, Lucius Hubbard, and ask to have their guarantee deposit of five hundred dollars (\$500) refunded, and said petition being read, it is ordered by the board that when said road is completed, as per the grant and subsequent orders of the board, then said amount will be refunded.’

“ And the court finds, as a conclusion of law from the foregoing facts, that the plaintiff is entitled to recover in this action the sum of five hundred dollars, to which conclusion of law the defendant now excepts.

DANIEL NOYES.

“ January 6th, 1887.”

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This special finding indicates what the conditions were upon the performance of which the appellee was to have repaid to it the \$500 it had paid into the treasury of the appellant. It discloses further that the appellee had failed to comply with the conditions in particulars that are important and material.

It is elementary that one party to a contract can not enforce a contract against the other without showing a performance on his part or a legal excuse for not having performed.

It is shown in the special finding that it would work inconvenience to the appellee, and put it to a considerable outlay financially, if required to perform the conditions of the contract on its part, and that is the most that is shown.

We have never understood that the law will excuse a party from the performance of his contract because it will be a hardship upon him if he is required to perform, and we think no authority can be found to sustain such a contention. 2 Parsons Contracts, 808-809; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Wheeler, etc., Mfg. Co. v. Worrall*, 80 Ind. 297; *Indianapolis, etc., R. R. Co. v. Holmes*, 101 Ind. 348; *Shearer v. Evansville, etc., R. R. Co.*, 12 Ind. 452; *Parker v. Thomas*, 19 Ind. 213; *Taylor v. Fletcher*, 15 Ind. 80; *Moore v. Campbell*, 111 Ind. 328.

The parties made the contract for themselves, and the law will only enforce it according to its terms and conditions.

The appellant having agreed to pay to the appellee a certain sum of money when the latter did certain things, the law can not step in and say to the appellant, you shall pay the money, notwithstanding you have not received what you contracted for as a condition precedent to the payment. The court erred in its conclusions of law.

The judgment is reversed, with costs, and the court below is instructed to render judgment for the defendant.

Filed March 8, 1889.

The Town of Noblesville v. Vestal *et al.*

No. 13,528.

THE TOWN OF NOBLESVILLE v. VESTAL ET AL.

INSTRUCTIONS TO JURY.—*When too Late to Request.*—It is not error for the court to refuse to give instructions when the request is made at the time that the court is giving its instructions to the jury.

From the Hamilton Circuit Court.

W. S. Christian, I. W. Christian and G. S. Christian, for appellant.

A. F. Shirts and G. Shirts, for appellees.

ELLIOTT, C. J.—We are compelled by settled rules to sustain the point of the appellees that the record fails to show that the instructions refused were asked at the proper time. The record shows that at the time the court was giving its instructions the appellant requested it to give those which were refused. This was too late.

We should violate a long established rule if we disturbed the verdict. Although the plaintiffs' case is not a strong one, yet there is evidence from which all the facts essential to the support of the verdict may be inferred.

Judgment affirmed.

Filed March 9, 1889.

Engleman v. Arnold.

No. 13,536.

ENGLEMAN v. ARNOLD.

118	81
147	500
118	81
148	183
118	81
156	636

SUPREME COURT.—*Brief.—Waiver of Error.*—Error which is not discussed in the Supreme Court, in the brief of the party assigning it, is waived.

BILL OF EXCEPTIONS.—*Practice.—Vacation.—When May be Filed in.*—A bill of exceptions can only be filed in vacation, upon the authority given by the court for that purpose when in session, and such authority must appear by the record, and not by the bill of exceptions. Without such authority the bill of exceptions is no part of the record.

From the Huntington Circuit Court.

J. B. Kenner and *J. I. Dille*, for appellant.

T. G. Smith, for appellee.

OLDS, J.—This was an action brought by the appellee against the appellant on two promissory notes and an open account; the notes were given in settlement of an account for merchandise.

There are two errors assigned:

1st. Error in overruling the demurrer of appellant to the second paragraph of the appellee's reply.

2d. Error in overruling the appellant's motion for a new trial.

The first error is not discussed by the attorneys for appellant in their brief, and no objection is pointed out to the second paragraph of reply, which was demurred to by appellant, hence no question in regard to the sufficiency of the paragraph of reply is raised here, it being waived by the failure of counsel for appellant to point out any objection. *Williams v. Nesbit*, 65 Ind. 171.

It is contended by counsel for appellee that no question is presented to this court on the overruling of the motion for a new trial, which is assigned as error, as the record shows

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no exception to the ruling, and that the question is not properly presented by the bill of exceptions.

The record shows a trial and judgment, and the filing of a motion for a new trial. It does not show any ruling by the court on the motion for a new trial, nor does it show any exception, or any time given to file a bill of exceptions. Judgment was rendered on the 19th day of April, 1886, the same being the nineteenth judicial day of the March term, 1886, of said court, and on the following day a motion for a new trial was filed. Afterwards, on the 3d day of July, 1886, the bill of exceptions was signed and filed. In the bill of exceptions it is stated "that a motion for a new trial was filed and overruled, exceptions by appellant, then judgment was rendered against appellant, an appeal prayed and granted, and that appellant asked time to file a bill of exceptions, which was granted, and ninety days' time given, and now, within the time, the bill is tendered and signed by the judge, and made a part of the record."

It has been repeatedly held by this court that a bill of exceptions can only be filed in vacation, upon the authority given by the court for that purpose when in session, and such authority must appear by the record, and not by the bill of exceptions; that without such authority the bill of exceptions is no part of the record. *Jones v. Jones*, 91 Ind. 72; *Applegate v. White*, 79 Ind. 413; *City of Indianapolis v. Kollman*, 79 Ind. 504; *Nye v. Lewis*, 65 Ind. 326; *Schoonover v. Reed*, 65 Ind. 313; *Goodwin v. Smith*, 72 Ind. 113; *Benson v. Baldwin*, 108 Ind. 106.

The bill of exceptions in this case is not a part of the record, and therefore no question is presented on the ruling on the motion for a new trial.

Judgment affirmed, with costs.

Filed March 9, 1889.

Ex Parte Griffiths, Reporter.

No. 14,812.

EX PARTE GRIFFITHS, REPORTER.

COURTS.—Judges.—Ministerial Duties.—Judges can not be required by the Legislature to perform ministerial duties.

SAME.—Constitutional Duties.—Legislature May not Add to.—The Legislature has no power to add to the duties which are devolved upon judges by the Constitution.

SAME.—Supreme Court.—Syllabi of Decisions.—Reporter's Duties.—Under the Constitution of this State the Legislature can not require the judges of the Supreme Court to discharge an essential duty of the reporter by the preparation of *syllabi* of decisions.

L. T. Michener, Attorney General, *W. F. Browder*, *A. F. Potts* and *V. G. Clifford*, for petitioner.

ELLIOTT, C. J.—The reporter of the decisions of this court files this petition invoking judgment upon the validity of the act of March, 1889. Among other provisions that act contains the following: "Opinions involving no disputed principles of law or equity or rule of practice, and no question except as to whether the verdict or decision is sustained by sufficient evidence or is contrary to the evidence, shall be printed in brier type, without analysis or syllabus. * * The index and tables of cases shall be subject to the supervision and direction of the Supreme Court. * * It shall be the duty of the Supreme Court to make a syllabus of each opinion recorded by said court, except as hereinbefore otherwise provided." Acts of 1889, p. 87.

If the act assumed to require the judges of the Supreme Court to perform the duties of the clerk by preparing entries, or to discharge the duties of the sheriff by preparing returns for him, we suppose no one would hesitate to declare it void. The fact that the officer whose duties the act assumes to direct the judges to perform is the reporter, and not the clerk or the sheriff, can make no difference. Neither shade nor semblance of difference can be discerned by the keenest vision

118	83
118	355
119	521
118	83
136	59
136	596
118	83
147	493
118	83
164	627
118	83
166	602
166	603
166	610
168	186

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between the cases instanced by way of illustration and the real case. The principle which rules is this: Judges can not be required to perform any other than judicial duties. This is a rudimental principle of constitutional law. To the science of jurisprudence, it is as the axiom that the whole is equal to all its parts is to the science of mathematics. There is no contrariety of opinion upon this subject. There is no tinge of reason for asserting a different doctrine. We quote Judge Cooley's statement of the principle, although it is found in a book intended for beginners, because it expresses the rule clearly and tersely. This is his statement: "Upon judges, as such, no functions can be imposed except those of a judicial nature." Principles of Const. Law, 53. The authorities upon this point are many and harmonious. *Hayburn's Case*, 2 Dall. 409, n.; *United States v. Ferreira*, 13 How. 40, n.; *Auditor v. Atchison, etc., R. R. Co.*, 6 Kan. 500; *Supervisors of Election*, 114 Mass. 247; *Rees v. City of Watertown*, 19 Wall. 107; *Heine v. Levee Commrs.*, 19 Wall. 655; *Smith v. Strother*, 68 Cal. 194; *Burgoyne v. Supervisors*, 5 Cal. 9; *People v. Town of Nevada*, 6 Cal. 143; *Hardenburgh v. Kidd*, 10 Cal. 402; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *State v. Young*, 29 Minn. 474; *Shepherd v. City of Wheeling*, 4 S. E. Rep. 635.

The preparation of the *syllabi* is an essential part of the reporter's work. Head-notes may be copyrighted, but the opinions of the court can not be. The *syllabi*, or head-notes, may be copyrighted because they are the work of the reporter and not of the judges. The work is essentially and intrinsically ministerial, and, therefore, can not be performed by the judges or the court.

The soundness of the rule stated by Judge Cooley is beyond controversy, and it is hardly necessary to go further, since it is conclusive here, but the provisions of our Constitution are so clear and decisive that we can not forbear referring to them. These provisions are found in article 7, and read thus:

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“Section 5. The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case and the decision of the court thereon.

“Section 6. The General Assembly shall provide, by law, for the speedy publication of the decisions of the Supreme Court made under this Constitution; but no judge shall be allowed to report such decisions.”

These provisions, when read in connection with section 1 of article 3, distributing the powers of government, and section 1 of article 7, lodging the whole judicial power of the State in the courts, make it perfectly clear that the Legislature can not impose any of the duties of the reporter upon the judges of the Supreme Court. Section 5 defines the duties of the court, and to these duties the Legislature can make no additions. The last clause of section 6 is a positive prohibition, and no judge can, without an open defiance of the Constitution he has sworn to support, take upon himself the duties of the reporter.

The principle which controls here has been asserted and applied by this court. By force of this principle the act of 1875, concerning the office of reporter, was overthrown. Judge Buskirk, in speaking of the decision, says it was the unanimous judgment of the court. Buskirk Practice, 12. That learned judge discusses the question at length and very clearly proves that the Legislature has no power to require the judges to exercise any of the functions of the office of reporter. There are many decisions asserting and enforcing the general principle involved here. It is, indeed, everywhere agreed that constitutional courts are not subject to the will of the Legislature, for, as said in *Wright v. Defrees*, 8 Ind. 298, “The powers of the three departments are not merely equal,—they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other.” In the case of *Houston v. Williams*, 13 Cal. 24, the court, speaking by FIELD, J. (now one of the justices of the Supreme Court of

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the United States), said: "The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties, this court can not be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions." The Supreme Court of Arkansas, discussing the general subject, cites with approval the case of *Houston v. Williams*, *supra*, and says, of the constitutional right of the court, that: "The legislative department is incompetent to touch it." *Vaughan v. Harp*, 49 Ark. 160. In a recent decision of our own it was said: "It is true that the judiciary is an independent department of the government, exclusively invested by the Constitution with one element of sovereignty, and that this court receives its essential and inherent powers, rights and jurisdiction from the Constitution and not from the Legislature." *Smythe v. Boswell*, 117 Ind. 365. Of the many other cases sustaining this doctrine, we cite *Little v. State*, 90 Ind. 338 (46 Am. Rep. 224), and authorities cited; *Sanders v. State*, 85 Ind. 318; *Shoultz v. McPheeters*, 79 Ind. 373; *Nealis v. Dicks*, 72 Ind. 374; *Greenough v. Greenough*, 11 Pa. St. 489; *Chandler v. Nash*, 5 Mich. 410; *Hawkins v. Governor*, 1 Ark. 570; *In re Janitor of Supreme Court*, 35 Wis. 410; *Speight v. People*, 87 Ill. 595; *Ex Parte Randolph*, 2 Brock. 447.

It is our judgment that the petition brings before us these three questions: (1st) Can the Legislature impose ministerial duties upon the court? (2d) Can the Legislature add duties to those devolved upon the judges by the Constitution? (3d) Can the Legislature, in violation of the constitutional inhibition, authorize the judges to discharge the essential duties of a reporter? Upon these questions we express our judgment and sustain the petitioner's contention, but we neither express nor intimate an opinion upon any others, although others are discussed.

We have no doubt that it is our right and our duty to

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give judgment upon the questions we have stated, because they directly concern the rights, powers and functions of the court, and no other tribunal can determine for us what our rights, duties and functions are under the Constitution.

Filed March 15, 1889.

No. 13,512.

BAKER v. LUDLAM.

JUDGMENT.—*Review of.*—*For What Causes Will Lie.*—A complaint to review a judgment for error apparent in the record will only lie for causes which would have been available on appeal.

SAME.—*Default While Answer is Pending.*—*Motion to Set Aside.*—If judgment is rendered against a defendant by default, notwithstanding he has an answer on file, he can not, in the absence of a motion to set the default aside, maintain an action for review.

SAME.—*Pleading.*—*Theory.*—*Complaint for Review.*—A pleading must be good on the theory upon which it proceeds; and hence a complaint which is drawn to review a judgment will not be upheld as an application under section 396, R. S. 1881, to be relieved from the judgment, on the ground of mistake, inadvertence, etc.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

J. Claybaugh, for appellee.

MITCHELL, J.—This was an action by Lillian G. Ludlam against Sanford Baker and Mary C. Baker to recover the possession of certain real estate in Clinton county.

After answering separately by a general denial, the defendant Mary C. Baker filed a cross-complaint in two paragraphs, in which, substantially, the following facts are exhibited: In

118	87
190	439
198	462
118	87
134	430
136	666
136	411
118	87
153	494

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July, 1882, the cross-complainant, being the owner of the land described in the complaint, executed a mortgage, in which her husband, Sanford Baker, joined, to secure a debt amounting to over \$1,300 due from the latter to William E. Ross. The note and mortgage having been assigned to the plaintiff, she instituted a suit of foreclosure thereon in the Clinton Circuit Court, on the 23d day of January, 1884. After being duly served with summons, the cross-complainant appeared and answered the complaint, alleging in her answer that the real estate described in the mortgage was her separate property, and that she was a married woman at the time the mortgage was executed, and that the debt thereby secured was the debt of her husband. It is averred in the cross-complaint that the cross-complainant had employed four attorneys, whose names are set out, to present and conduct her defence to the foreclosure suit; that after they had filed her answer, and a reply had been filed thereto, three of the attorneys employed by her withdrew from the case by leave of the court and at the direction of her husband. It is averred that the discharge of her attorneys by her husband was without her authority, that one of the attorneys employed by her continued in the case with authority to act, and that her answer had not been withdrawn. It is charged that, after the withdrawal of the attorneys as above, and notwithstanding her answer and the continued appearance of one of her attorneys, the court, in her absence, caused the cross-complainant and her co-defendant to be called and defaulted, and thereupon rendered judgment against them by default, and entered a decree of foreclosure and an order for the sale of her land. The land was sold in pursuance of the decree, the plaintiff becoming the purchaser, and it is averred that the title obtained through the decree and sale is the only claim of ownership which the plaintiff in this action asserts. The cross-complaint embraces copies of the pleadings, proceedings and judgment in the original action, and it is charged that the judgment is erroneous and void because of the mat-

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ters hereinbefore recited. The prayer is that the judgment of foreclosure be reviewed, reversed and set aside, and that the cross-complainant be permitted to prosecute her defence to the original action without further embarrassment.

Separate demurrers were sustained to each paragraph of the cross-complaint, and, upon trial of the issue made upon the complaint, the plaintiff below had judgment for the recovery of the land.

On appellant's behalf it is now contended that because it appears that judgment was taken against her by default, notwithstanding the appearance of one of her attorneys, and because it is averred that her answer in the original action was not withdrawn, there is such error apparent upon the face of the record of the proceedings as entitles her to maintain her bill to review the judgment.

It may be conceded, as a general rule, that it is error to render judgment against a defendant by default while his answer to the complaint remains standing undisposed of. The proper course is, when the case is at issue, to call the defendant, and, if he fails to respond, submit the cause in its order to the court for trial. *Firestone v. Firestone*, 78 Ind. 534, and cases cited. After a defendant has been served with process, and appears and pleads to the action, the effect of a withdrawal of their appearance by his attorneys is to withdraw the defendant's answer, and a judgment may then be taken by default. *Dunkle v. Elston*, 71 Ind. 585; *McArthur v. Leffler*, 110 Ind. 526.

The present case is peculiar, in that it is recited in the record of the original action that three of the four attorneys whose names appear to have been signed to the answer withdrew their appearance by leave of court. The court thereupon entered judgment as by default, upon the assumption that the appearance and answer of the defendant had been withdrawn.

If, as is contended by the appellant, the appearance of the other attorney was not withdrawn, then she is in the attitude

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of being present in court by attorney when the default was taken. It does not appear that any objection was made or exception taken, nor was there then, nor has there been at any time since, an application or motion to set the judgment then taken aside. There is, therefore, no question presented involving the propriety of the proceedings of the court in causing judgment to be rendered by default, even though it be conceded that the appearance and answer of the appellant were not withdrawn in the original suit. It is thoroughly settled that a bill to review a judgment for error apparent in the record is in the nature of an appeal, and that a bill of review can only be predicated upon such error or errors as would be available upon an appeal to this court. *American Ins. Co. v. Gibson*, 104 Ind. 336, and cases cited.

In neither case can any question be made which depends upon a motion to set aside a default unless the record shows that such a motion was made and overruled and an exception taken. *Searle v. Whipperman*, 79 Ind. 424; *Tuchau v. Fiedelley*, 81 Ind. 54; *Traders Ins. Co. v. Carpenter*, 85 Ind. 350; *Shoaf v. Joray*, 86 Ind. 70.

The cross-complaint, therefore, presented no ground for reviewing the original judgment against the appellant. It is suggested, however, that if the cross-complaint is not sufficient as a bill of review, it is good as an application, under section 396, R. S. 1881, to be relieved from the judgment on the ground of mistake, inadvertence, surprise or excusable neglect. We can not assent to this view of the case. A pleading must proceed upon some single, definite theory, and it must be good upon the theory on which it proceeds. *First Nat'l Bank v. Root*, 107 Ind. 224; *Lane v. Schlemmer*, 114 Ind. 296.

The cross-complaint was framed upon the theory that it was a bill to review a judgment. The appellant must stand or fall by his pleading on that theory. We need not point out, therefore, wherein the cross-complaint is deficient as an application to be relieved from a judgment.

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We have carefully examined the evidence. It sustains the verdict of the jury.

Some questions are suggested in the brief, growing out of rulings of the court in admitting and excluding evidence. We have examined the questions thus made, and find no error which could in anywise affect the substantial merits of the cause or justify a reversal of the judgment.

The judgment is therefore affirmed, with costs.

Filed March 16, 1889.

118	91
121	306
118	91
128	320
118	91
143	677

No. 13,399.

HAYS v. MONTGOMERY.

PLEADING.—Theory.—A pleading must be good on the theory upon which it is drawn.

LIEN.—Real Estate.—Conveyance without Consideration.—General Debts of Grantor.—The general debts of a party who conveys land without consideration are not a lien upon the land.

FRAUDULENT CONVEYANCE.—Complaint.—A complaint to set aside a conveyance as fraudulent as against creditors must allege that the conveyance was made to defraud.

SAME.—Parties.—Administrator.—An administrator of a debtor who dies without heirs is a necessary party defendant to an action by creditors to set aside, as fraudulent, a conveyance made by the debtor.

SAME.—Agreement to Support Grantor.—Fraudulent Intent.—Notice.—A conveyance made in consideration of an agreement by the grantee to support the grantor for life, is valid, unless made with intent to defraud creditors, of which intent the grantee has notice at the time of the conveyance.

From the Madison Circuit Court.

H. D. Thompson, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

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COFFEY, J.—The second paragraph of the complaint in this cause, omitting the formal parts, is, substantially, as follows: That, on the 25th day of September, 1884, one John Laughlin was indebted to the appellee in the sum of eight hundred and thirty dollars on an account for boarding, supporting and maintaining the said Laughlin by the plaintiff at his special instance and request, and for the value of a house built by plaintiff at the special instance and request of said Laughlin, on the real estate hereinafter described, and for work and labor done and performed by plaintiff at the special instance and request of said Laughlin, a bill of particulars of which is filed with the complaint; that while so indebted to the plaintiff, said Laughlin, on the 24th day of September, 1884, conveyed to the defendant, Luther Hays, the following land owned by him, to wit: The southwest quarter of the northwest quarter of section ten, township twenty north, of range seven east, in Madison county, Indiana; * * that, at the time of said conveyance, said Hays had full notice and knowledge of the plaintiff's claim against the said Laughlin; that no consideration passed from said Hays to said Laughlin at the time, but the only consideration for such conveyance was the agreement of said Hays to support, board and maintain the said Laughlin during his natural life, and for future benefits to accrue to said Laughlin; that said Laughlin had no personal property, and by said conveyance stripped himself of all his property and became insolvent; that since this suit commenced said Laughlin has died insolvent, leaving no estate whatever and no property, real or personal, out of which plaintiff can make his said debt or any part thereof; that the said Laughlin died intestate and left no widow or heirs at law; that no letters of administration have ever been granted upon his estate, and that there are no debts against said estate except the debt of the plaintiff. Prayer that the debt be declared a lien against said land and that it be foreclosed.

Hays v. Montgomery.

The appellant filed a demurrer to this complaint, alleging for cause :

1st. That the same did not state facts sufficient to constitute a cause of action.

2d. That there is a defect of parties, in that an administrator of the estate of Laughlin, deceased, should be made a party defendant.

The court overruled the demurrer, and the appellant excepted. The appellant filed an answer by way of general denial, and the cause was at issue. A trial resulted in the finding that Laughlin was indebted to the appellee in the sum of six hundred and fifty dollars, which the court declared to be a lien upon the land described in the complaint, and a decree was entered for the sale of the land for the payment of the same, over a motion by the appellant for a new trial.

A motion was made by the appellant to modify the decree, and also a motion to tax the appellee with costs, which motions were overruled, and the appellant excepted. The errors assigned in this court are :

1st. That the court erred in overruling the appellant's demurrer to the complaint.

2d. That the court erred in overruling the appellant's motion for a new trial.

3d. That the court erred in overruling the appellant's motion for a judgment for costs.

4th. That the court erred in sustaining the appellee's motion for judgment on the verdict.

5th. That the court erred in overruling appellant's motion to modify the judgment.

It is so well settled in this State that a pleading, if good at all, must be good on the theory upon which it is drawn, that a citation of authorities is unnecessary. If this complaint is drawn upon the theory that the general debts of a party conveying land without consideration constitute a lien upon such land, then it is bad, for they are not a lien. We know

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of no principle of law or equity declaring them to be such. It is sought in argument to maintain the position that the complaint is good upon the ground that, where one sells land and receives part of the purchase-money and then refuses to convey, the purchase-money thus paid will be declared a lien on the land. But it must be observed that there is no allegation in the complaint that any part of the debt for which the appellee sues is part of the purchase-price of the land described in the complaint. If the complaint is drawn upon the theory that appellant had the right to set aside the conveyance on the ground that it was fraudulent, then it is bad for failing to allege that it was made to cheat and defraud creditors.

The doctrine announced in the case of *Potter v. Gracie*, 29 Am. Rep. 748, is held not to be the law in this State. In the case of *Willis v. Thompson*, 93 Ind. 62, it was held that a conveyance made in consideration of an agreement on the part of the grantee to support and maintain the grantor during life, was a valid one, and where the grantee had performed the contract it became a valuable consideration, and in order to set aside such conveyance as fraudulent as against creditors it was necessary to aver and prove that such conveyance was made with the fraudulent intent to cheat and defraud creditors, and that the grantee, at the time of the conveyance, had notice of such intent. If the complaint was drafted on the theory that the conveyance was fraudulent as to creditors, it was also necessary that the administrator of Laughlin should be a party, for the reason that the appellee could only collect his claim through the administrator. If none had been appointed, it was the duty of the appellee to have one appointed before he could proceed with his action. *Willis v. Thompson, supra*; *Allen v. Vestal*, 60 Ind. 245.

We know of no theory upon which the complaint in this case can be sustained. The court erred in overruling the demurrer of the appellant to the complaint.

As we have reached the conclusion that the complaint in

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the cause does not state facts sufficient to constitute a cause of action, it is unnecessary to examine the other assignments of error.

Judgment reversed, at the costs of the appellee, and cause remanded with instructions to the circuit court to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed March 16, 1889.

No. 13,559.

GOLDMAN v. OPPENHEIM.

CONTRACT.—*Administrator's Sale.*—*Agreement not to Bid.*—An agreement entered into for the purpose of preventing competition at an administrator's sale, is unlawful and void.

CHECK.—*Illegal Consideration.*—*Unlawful Contract.*—A check given in pursuance of an agreement whereby a bid made by the drawee for property offered for sale by an administrator shall be withdrawn, and the drawer allowed to purchase the property without competition, is not enforceable.

From the Cass Circuit Court.

S. T. McConnell and *D. B. McConnell*, for appellant.

J. C. Nelson and *Q. A. Myers*, for appellee.

OLDS, J.—This was an action on a check drawn by the appellee on the State National Bank, Logansport, Indiana, to the order of appellee for \$300, dated May 9th, 1883, and endorsed by the appellee to B. Simon & Co., and by them endorsed to appellant, and presented to the bank on which it was drawn for payment. Payment refused. The complaint is in proper form, and no question is raised as to its sufficiency.

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The defendant answered. Demurrers were filed for want of facts to the first, second, fifth and amended third paragraphs of answer, and overruled, and exceptions reserved by appellant. There was a trial, finding and judgment for the appellee. Appellant filed a motion for a new trial, which was overruled, to which ruling the appellant excepted. Error is assigned that the court erred in overruling each of the demurrers to the said paragraphs of answer, and in overruling the motion for a new trial.

No objection to the second and fifth paragraphs of answer is pointed out by appellant in his brief, and there is no discussion of the error assigned as to the ruling of the court on the demurrers to these paragraphs.

The first paragraph of answer and the amended third paragraph are pleaded upon the same theory, the only difference being that the third paragraph states the facts more fully than the first.

In each of said paragraphs it is alleged, in substance, that Levi Oppenheim died in Bartholomew county, Indiana, leaving as assets of his estate a stock of clothing, hats, caps and gentlemen's furnishing goods; that one Lewis Sloss was duly appointed the administrator of his estate, and obtained an order of the Bartholomew Circuit Court to sell said stock of goods at private sale, and that said administrator, in pursuance of said order, was about to sell said goods to the highest and best bidder; that, upon the 9th day of May, 1883, the day before said sale was to take place, the firm of Goldhart Brothers & Co., composed of William Goldhart, Charles Thurmauer and Lewis J. Goldman, the plaintiff, by said Charles Thurmauer, member of the firm, had bid the sum of \$4,000 for said stock of goods; that the defendant desired to purchase said stock of goods for \$3,400, and upon said day proposed to said Charles Thurmauer, who was acting for said firm of Goldhart Brothers & Co., that if he would withdraw the bid made by his said firm, he, the defendant, would give him his check for \$300. Thurmauer accepted the offer, and

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on the night of said 9th day of May, 1883, withdrew the bid made by him for his said firm; that the defendant then signed and endorsed said check sued upon, and delivered it to said Thurmauer, who delivered it to his said firm; that said firm sent it to the bank for payment, and payment was refused and the check protested, and during all the time the plaintiff was a member of said firm of Goldhart Brothers & Co., and that he became the owner of said check after it was protested, and knew at the time he purchased it that the defendant was contesting its legality and consideration, and refusing to pay it.

It appears from these allegations that the administrator was about to sell the goods in pursuance of the order of the court. It would be his duty to sell them to the highest responsible bidder, for not less than the appraised value, and he would be liable as such administrator if he failed to do so and loss resulted by reason thereof. Just before the sale was to take place, the appellee and Thurmauer, to whom he delivered the check, entered into an agreement by which appellee gave his check to Thurmauer for \$300, in consideration for which Thurmauer agreed to, and did, withdraw a bid of \$4,000 which he had made for the firm of which he was a member for the goods. This agreement was made for no other purpose, and could have no other effect, than to prevent competition in bidding on the property offered for sale, and to enable appellee to purchase the goods for a less sum than he otherwise could, to the detriment of the estate of the deceased. Such a contract is unlawful, and can not be enforced. *Atcheson v. Mallon*, 43 N. Y. 147; *Brisbane v. Adams*, 3 N. Y. 129; 1 Wharton Contracts, section 443; *Gulick v. Ward*, 18 Am. Dec. 389; *Hunter v. Pfeiffer*, 108 Ind. 197.

The demurrers were properly overruled to the several paragraphs of answer.

The only question presented by the motion for a new trial

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is as to whether the evidence sustains the finding of the court. The evidence fairly supports the finding. There is no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed March 16, 1889.

118	98
121	354
118	98
126	101

No. 12,929.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. STOCKWELL.

RAILROAD.—*Conductor.—Employment of Physician.—Ratification by Company.*

—Where a conductor, claiming to act as the agent of the railroad company, employs a physician to render professional aid to a stranger injured by collision with his train, telling the physician that he will leave the injured person in his care for treatment, and for him to send his bill to the superintendent of the road, and the company is notified of the employment, and permits the physician to go on and render services thereunder, it thereby ratifies the conductor's act, and is liable for services rendered until the patient is convalescent. MITCHELL, J., dissents.

EVIDENCE.—*Telegram.—Parol Evidence of Contents.*—Where it does not appear that a message given to a telegraph operator for transmission was in writing, it can not be held that parol evidence of the contents of the message was improperly admitted.

SAME.—*Harmless Error.*—There is no available error in admitting parol proof of the contents of a telegram where it is in evidence that the information contained therein was orally communicated by the sender of the message to the receiver.

From the Putnam Circuit Court.

J. G. Williams, D. E. Williamson and A. Daggy, for appellant.

S. A. Hays, for appellee.

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BERKSHIRE, J.—There are two errors assigned: 1st. The court erred in overruling the demurrer to the complaint. 2d. The court erred in overruling the motion for a new trial.

The complaint, in substance, alleges that, in the year 1884, the appellant, by its employees, operating and running a locomotive engine and train of cars over its railroad track, through Reelsville, a station on the line of its railroad, then and there ran said locomotive engine against one William McCray, and then and there and thereby seriously injured him by then and there causing a compound comminuted fracture of both bones in the left forearm, etc.; that the injury was of a character so serious as to require immediate attention; that the said station is many miles distant from the principal offices of the appellant, and from the residences of its principal officers, and that one John Trindle was the conductor in charge of said train, and, as the agent of the appellant, employed the appellee, who was a resident surgeon and physician of said station, to render professional services to the said McCray, and that he did, in accordance with said request and employment, render the said McCray surgical aid and attention from the — day of —, 1884, to the — day of —, 1885, and that his services and employment were made known to the company immediately after the accident, and it had full knowledge thereof; that the said services so rendered were of the value of \$300; that the said conductor was the highest representative of the appellant and the superior officer present when the accident occurred and said employment made. A bill of particulars is filed with the complaint as a part of it.

We are of the opinion that the complaint stated a cause of action. It is not necessary that we determine whether or not, under the circumstances averred, the conductor as the agent of the company had authority by a simple employment to bind the company for the services rendered. It is shown that the injury occurred; that the conductor, as the agent of the company, employed the appellee to render the ser-

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vices; that when the services were rendered the appellant had full knowledge of all the facts, and that the appellee was never discharged by the appellant. We are of the opinion that if the services were rendered under the employment as stated, and with a full knowledge of all the facts at or about the time of the accident or employment, and that the appellant permitted the appellee to go on and render services after it had acquired such knowledge, it thereby became liable for the services rendered; that is to say, if the company, having been informed of the accident, the employment of the appellee by its conductor, claiming to act as its agent, and that the appellee was acting under the employment, did not intend to hold itself responsible for the services rendered, it became and was its duty to so notify the appellee, and its failure to do so was a ratification of the employment as made by the conductor. *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358-364; *Toledo, etc., R. R. Co. v. Rodrigues*, 47 Ill. 188; *Toledo, etc., R. R. Co. v. Prince*, 50 Ill. 26; *Indianapolis, etc., R. R. Co. v. Morris*, 67 Ill. 295; *Cairo, etc., R. R. Co. v. Mohoney*, 82 Ill. 73; *Beach Con. Neg.*, pp. 221-222.

The first reason for a new trial is, that the verdict is not sustained by sufficient evidence. The second reason is, that the verdict is contrary to law.

We may consider the two reasons together. The evidence establishes the facts of the accident, the employment by the conductor, that he was the superior officer present when the accident occurred, and that the appellee rendered the services sued for.

The agent of the appellant at the station where the accident occurred testified that on the same day, and soon thereafter, the conductor came into the office and sent telegrams, both to the general superintendent and general agent of the company, that the train of which the conductor had charge had struck a man, and broken one of his arms, and that he had left him in charge of Dr. Stockwell.

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The conductor testified to having sent the telegrams as stated by the agent, and further, that when he arrived at St. Louis that evening he reported to the general superintendent that he had struck a man at Reelsville, and had employed a physician to dress his wounds.

On the 28th day of April, 1885, the appellee addressed a letter to the president of the company, stating the circumstances of the employment, the services he had rendered in a general way, and demanding payment therefor. We must conclude that this letter was duly received, for the appellant produced and introduced it in evidence on the trial.

There is no evidence tending to show that the appellant ever questioned or repudiated the employment as made by the conductor, not even after the receipt of the appellee's letter. From the evidence, the court trying the cause was fully justified in finding that the conductor's employment of the appellee to render the services was thereafter ratified and confirmed, and this rendered the appellant liable.

The third reason assigned for a new trial is, that the court erred in its assessment of the amount of damages, and the fourth reason is excessive damages assessed.

It is contended that the employment extended only to the dressing of the wound at the station, and that the after-services were not within the employment, and that the appellant is not liable therefor.

We are not of this opinion. The appellee testified that the conductor informed him that he would leave McCray in his care for treatment. Two other witnesses testified that the conductor said to the appellee that he would leave McCray in his care. The conductor testified that he called for a physician, and that the appellee spoke up and stated that he was one, and that he said to the appellee that he should dress McCray's wounds and send the bill to the general superintendent.

It is our opinion that the court was authorized by the evidence in finding that the employment given to the appellee, and its subsequent ratification, covered all services necessary

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and proper which the appellee might render until the patient had become convalescent.

The letter of the appellee introduced in evidence fixed the value of the services at the same amount as found by the court. All the other evidence in the case on that subject placed the value much higher. We are therefore of the opinion that the appellant has no cause to complain of the amount of damages assessed.

The fifth and last reason for a new trial is, that the court erred in admitting the evidence of the witness Ford as to the contents of the telegrams sent by the conductor. It is a well settled rule of evidence that parol evidence can not be introduced of the contents of a written instrument until some excuse is shown for its absence. The objection to the introduction of the evidence was that the loss or destruction of the telegrams was not shown. The difficulty standing in the way of this objection is that it nowhere appears that the telegrams were in writing. If the conductor did not reduce the telegrams to writing, but gave them verbally to the operator, then what he said to the latter was an oral communication, and susceptible of parol proof. We know as a matter of fact that many telegrams are communicated and sent in the manner we have suggested, and we should not conclude without proof that the telegrams in question were given in writing to the operator who sent them. If the point should be made that they were reduced to writing at the receiving office, the answer would be that the court could not find that out without proof, for it is not impossible for both telegrams to have been delivered by word of mouth. The witness Ford does not testify that the telegrams were reduced to writing by the conductor. His evidence upon that subject is: "The conductor of the train, John Trindle, came to the office and sent a telegram; I don't think I have the telegram; I did not look for it, as I did not think it was necessary, as it is the custom of the office, after a certain length of time, to destroy the telegrams, and I think this one was

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destroyed." The witness evidently had no recollection upon the subject, and simply gave his opinion and conclusion from what he knew to be the custom of his office in disposing of old telegrams.

But there is a further reason why there is no available error in the admission of the testimony. The conductor testified that he gave the information conveyed by the telegrams to the general superintendent, the same evening of the accident, after arriving at St. Louis, therefore the appellant was not injured because of the admission of the evidence objected to.

We see no error in the record, and are of the opinion that the judgment should be affirmed.

Judgment affirmed, with costs.

COFFEY, J., took no part in the decision of this case.

MITCHELL, J., does not concur in this opinion so far as it seems to hold that the conductor could bind the railroad company, by the employment of a physician, without some express authority to that end.

Filed March 16, 1889.

118	103
118	117
118	280
118	508
118	600

118	103
169	193

No. 13,508.

VINSON v. THE TOWN OF MONTICELLO.

PLEADING.—*Complaint.*—*Ordinance.*—*Enactment.*—*Sufficiency of Allegation as to.*—An allegation in a complaint, that an ordinance was enacted by the board of trustees of the town, is sufficient, as the trustees alone are authorized to enact ordinances.

MUNICIPAL CORPORATION.—*Intoxicating Liquor.*—*Sale, Barter or Giving Away of.*—*Ordinance Relating Thereto.*—*Validity of.*—An ordinance which prohibits the sale, barter or giving away of intoxicating liquor without a license, is valid. The substantive grant contained in the statute is the

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power to license, regulate and restrain the sale of intoxicating liquors, but as a necessary incident to this power is included the power to prohibit the bartering or giving away of intoxicating liquors.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellant.

MITCHELL, J.—The town of Monticello instituted a suit against Vinson to recover a penalty prescribed by an ordinance alleged to have been enacted by “the town, by its board of trustees,” on the 1st day of June, 1886, prohibiting any person from selling, bartering or giving away any intoxicating liquor in a less quantity than a quart, without first procuring a license from the proper municipal authority.

For the appellant it is now contended that the court erred in overruling a demurrer to the complaint. It is said it does not appear with sufficient certainty what officers of the town enacted the by-law or ordinance. The suggestion is altogether without force. It is averred that the ordinance was enacted by the board of trustees, and, as the trustees alone are authorized to enact ordinances, it follows that the averment is certain and definite. *Hardenbrook v. Town of Ligonier*, 95 Ind. 70. Lastly, it is said the ordinance is void because it assumes to prohibit the sale, barter or giving away of intoxicating liquor without a license, while the statute only authorizes towns to license, regulate and restrain the sale of spirituous, vinous, malt and other intoxicating liquors within the corporation. The substantive grant contained in the statute is the power to license, regulate and restrain the sale of intoxicating liquor, but as a necessary incident to the power to restrain and regulate the sale, and to prevent the evasion of any ordinance against selling without license, is included the power to prohibit the bartering or giving away of any intoxicating liquor. *State v. Adamson*, 14 Ind. 296; *Williams v. State*, 48 Ind. 306. This is upon the principle that a grant carries with it by implication all that is neces-

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sary to make the power granted effectual. The ordinance is, therefore, valid as a whole.

The judgment is affirmed, with costs, and five per cent. damages.

Filed Jan. 26, 1889; petition for a rehearing overruled March 26, 1889.

No. 13,515.

SMAIL v. SANDERS ET AL.

TRADE-MARK.—*Injunction.*—*State Courts.*—*Jurisdiction of.*—The State courts have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. The act of Congress assuming to confer exclusive jurisdiction upon the Federal courts in trade-mark cases has been pronounced unconstitutional.

SAME.—*When Injunction will Lie.*—An injunction will be awarded where there is a fraudulent purpose and a wrongful imitation of the name and label of a competitor.

PLEADING.—*Demurrer Addressed to Entire Pleading.*—*Effect of.*—Where a demurrer is addressed to an entire pleading, one paragraph of which is good, it is proper to overrule the demurrer.

From the Montgomery Circuit Court.

N. P. H. Proctor, for appellant.

J. Wright and *J. M. Seller*, for appellees.

ELLIOTT, C. J.—The appellees allege in their complaint that they are the proprietors of a trade-mark; that the words of the trade-mark are "Dr. Bass' Vegetable Liver Pills;" that it is duly registered according to the act of Congress; that they are using in their business a label on which the words of the trade-mark are printed together with other matter; that the defendant has imitated the label and is using

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the trade-mark, and that he is selling pills contained in boxes with labels and wrappers similar to those used by the plaintiffs; that by reason thereof he has deceived and is deceiving the public and injuring the plaintiffs, by palming off worthless pills. Prayer for an injunction.

The State courts have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. The act of Congress assuming to confer exclusive jurisdiction upon the Federal courts in trade-mark cases has been pronounced unconstitutional. *United States v. Steffens*, 100 U. S. 82; *Leidersdorf v. Flint*, 7 Cent. Law J. 405. These decisions settle the question, and, beyond all doubt, settle it correctly, since Congress has no more power to deprive the State courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property. A trade-mark is not within the provisions of the Federal Constitution respecting copyrights and patents.

The complaint makes a case for injunction. It shows a wrongful imitation for a fraudulent purpose, and this invokes the assistance of the courts of chancery. We do not enter the field of conflict in thus deciding, for while there is much conflict as to whether the name of a person will constitute a trade-mark, it is well agreed that where there is a fraudulent purpose and a wrongful imitation of the name and label an injunction will be awarded. *Howe v. Howe Machine Co.*, 50 Barb. 236; *Sykes v. Sykes*, 3 Barn. & C. 541; *Croft v. Day*, 7 Beav. 84; *Ainsworth v. Walmesley*, 35 L. J. Ch. 352; *Foster v. Blood Balm Co.*, 77 Ga. 216; *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147; *Metcalf v. Brand*, 86 Ky. 331; *Russia Cement Co. v. LePage*, 147 Mass. 206. We are not dealing with a case where the defendant's name is the same as that used in the distinctive mark chosen by the plaintiff, so that we are not required to ascertain or decide what the rule is in a case where the controversy is waged between two persons of the same name.

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The first paragraph of the reply is an affirmative one, the second is the general denial. The general denial is certainly good, and as the demurrer was addressed to the entire reply it was properly overruled. We can not disturb the verdict. Judgment affirmed.

Filed Feb. 22, 1889; petition for a rehearing overruled March 26, 1889.

No. 13,664.

MATSINGER ET AL. v. FORT ET AL.

PRACTICE.—Exceptions.—When Must be Taken.--In order to save any question for review in the Supreme Court, the exception to the decision of the lower court must be taken at the time the decision is made. If taken afterwards, it will not be considered on appeal.

From the Madison Circuit Court.

H. D. Thompson, for appellants.

E. Marsh, *W. W. Cook*, *C. L. Henry* and *H. C. Ryan*, for appellees.

OLDS, J.—This is an action for partition. The complaint is in two paragraphs. The main facts alleged are, that Eliza K. Mitchell was the owner of the real estate; that her husband was addicted to the use of intoxicating liquors; that Mrs. Mitchell was in ill health and recognized the fact that she must soon depart this life, and that if she left her estate to her husband he would immediately squander it; that the plaintiff Mary M. Matsinger and the defendant Ada Fort were her only children, and that she entered into a parol agreement with her daughter Ada, her husband concurring,

118	107
133	63
118	107
135	608
118	107
140	298

whereby she conveyed to Ada, her husband joining in the deed, the real estate in question in this case, with the agreement that Mrs. Mitchell, her husband and daughter Ada, should occupy the real estate during the lifetime of Mrs. Mitchell, and after her death her husband and daughter Ada should continue to live on the property and keep it as their home, or on failure to do so they should divide the property equally between the husband of Mrs. Mitchell and her two daughters, or, if thought best, sell it and divide the proceeds of the sale equally; that Ada took possession of the real estate, and in pursuance of said agreement Mr. and Mrs. Mitchell and Ada lived and made their home upon the premises until the death of Mrs. Mitchell, and Mr. Mitchell and Ada lived upon the same until some time after the death of Mrs. Mitchell, when Ada refused to live there longer or to allow her father to live upon the same, and refused to divide the real estate or sell the same and divide the proceeds of sale as she had agreed, and that she rented said real estate. Prayer asking that the husband and two daughters be declared the owners of said real estate in equal portions, and for partition, and in case of its indivisibility, that the same be sold and the proceeds divided.

A demurrer was filed to the complaint by appellees and sustained, and judgment rendered on demurrer against appellants in favor of appellees.

The appellants assign as error the ruling of the court in sustaining the demurrer to the complaint. Counsel for appellees contend that there was no exception taken to the ruling of the court at the proper time, and that there is no question properly presented to this court.

The record shows that, "on the 29th day of October, 1886, the same being the 17th judicial day of the October term, 1886, of said court, the following proceedings were had in said cause, to wit: The parties by counsel come, and the defendants' demurrer to each paragraph of the plaintiffs' amended complaint, being submitted to the court, is sus-

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tained." On the 10th day of November, 1886, the same being the 27th judicial day of the October term, 1886, the following entry is made: "The parties by counsel come, and the plaintiffs except to the ruling of the court heretofore made sustaining defendants' demurrer to plaintiffs' amended complaint." Then follow the finding and judgment.

Section 626, R. S. 1881, provides that "The party objecting to the decision must except at the time the decision is made." In the case of *Hull v. Louth*, 109 Ind. 315, 333, the special finding of facts and conclusions of law were filed on the 31st day of December, 1883. No exceptions were taken to the conclusions of law upon that day. Nothing further was done until on the 3d day of January, 1884, when the plaintiff excepted to the conclusions of law. The court in that case says: "It is settled by the decisions of this court, that in order to save any question for review here, in a case like this, an exception to the conclusions of law must be taken at the time the decision is made." It is so well settled that, in order to save any question on the decision of the lower court, the exception must be taken at the time the decision is made, that it is unnecessary to cite further authorities. There is no question presented to this court on the ruling of the court below in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed March 26, 1889.

Topper v. The State.

No. 14,805.

TOPPER v. THE STATE.

CRIMINAL LAW.—*Misdemeanor.—Minor.—Giving Intoxicating Liquor to.—*

What Constitutes.—Where a saloon-keeper, at the direction of one who pays for the liquor, delivers a glass of intoxicating liquor to a person under the age of twenty-one years, he, as well as the person paying for the liquor, is guilty of a misdemeanor. All persons who participate in an act or transaction which is a misdemeanor are alike guilty.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

L. T. Michener, Attorney General, and *J. E. McCloskey*, Prosecuting Attorney, for the State.

BERKSHIRE, J.—This prosecution originated before a justice of the peace, and rests on section 2094, R. S. 1881, which makes it a misdemeanor to sell, barter or give away intoxicating liquor to a person under the age of twenty-one years. The affidavit contains two counts: (1) That the appellant unlawfully gave intoxicating liquor to Harry Kepler, a person under the age of twenty-one years. (2) That the appellant unlawfully sold intoxicating liquor to Harry Kepler, a person under the age of twenty-one years.

The appellant was adjudged guilty in the circuit court, as charged in the first count of the affidavit. There is but one error assigned, and that is, that the court erred in overruling the motion for a new trial. The case was tried by a jury, and the reasons assigned for a new trial are as follows:

1st. The verdict of the jury is not sustained by sufficient evidence.

2d. The verdict of the jury is contrary to the evidence.

3d. The verdict of the jury is contrary to law.

We have examined the evidence and are satisfied that the verdict of the jury is clearly right. Indeed, with proper

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instructions from the court, we can not imagine how the verdict could have been otherwise, if what Harry Kepler drank at the saloon of the appellant on the occasion in question was lager-beer, and though there was some conflict in the evidence as to whether it was lager-beer that was sold, we are of the opinion that the jury were justified in so finding. The evidence, in a nut-shell, is as follows :

The appellant kept a saloon and was his own bar-tender. On the occasion in question, one Cunningham was sitting in the saloon and Harry Kepler came in, he being a boy of the age of seventeen years. After a few words had passed between them, Cunningham asked Kepler if he would have something. Kepler said he would, when Cunningham directed the appellant to let Kepler have what he wanted, and acting under Cunningham's direction the appellant let Kepler have a sandwich and a glass of beer, which Kepler consumed, and Cunningham paid therefor. As between Cunningham and the appellant the transaction was a sale, but as between Cunningham and the appellant on the one hand, and Kepler on the other, it was a gift. It is not contended but that Kepler obtained the beer as a gift, but the contention is that as Cunningham was the donor the appellant is not guilty. That Cunningham was guilty of violating section 2094, *supra*, there is no question, but when this is conceded, how is the appellant to escape?

All persons who participate in an act or transaction which is a misdemeanor are alike guilty. This is a principle that is elementary and does not require a citation of authorities. The appellant sold to Cunningham a glass of lager-beer to be drunk by Kepler, who was a person under the age of twenty-one years, and by the direction of Cunningham at the time he called for the beer, the appellant poured the same out and delivered it to Kepler to be drunk by him. We may state the argument syllogistically as follows : Whoever gives away intoxicating liquor to a minor is guilty of a misdemeanor ; Cunningham and the appellant, acting in concert,

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did give away to Kepler, a minor, intoxicating liquor; therefore, Cunningham and the appellant are guilty of a misdemeanor.

Judgment affirmed, with costs.

Filed March 26, 1889.

No. 13,627.

RAY ET AL. v. YARNELL.

EXECUTION.—Lien.—Property not subject to an execution is not subject to its lien.

SAME.—Exemption.—Conveyance by Debtor.—Sheriff's Sale.—A judgment debtor may convey real estate which he claims as exempt from execution, and one who purchases the property at sheriff's sale under the judgment acquires no title as against the prior grantee of the debtor, whose deed is duly recorded.

SAME.—Alias Execution.—Additional Schedule.—A purchaser of exempted property from a judgment debtor, having recorded his deed, is not bound to oppose the issue of executions or to secure additional schedules from his grantor.

SAME.—Notice.—Means of Knowledge.—A purchaser who has the means of knowledge, in legal contemplation has knowledge, and can not be deemed an innocent purchaser.

From the Pulaski Circuit Court.

D. C. Justice, for appellants.

N. L. Agnew and *B. Borders*, for appellee.

ELLIOTT, C. J.—The facts embodied in the special finding may be thus summarized: On the 26th day of January, 1884, the appellants obtained judgment against Barbara Stalnaker before a justice of the peace, and on the 25th day of February caused a properly certified transcript to be filed in the

118	112
146	597

118	112
149	212

118	112
162	638

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office of the clerk. The transcript was recorded and the proper affidavit filed. An execution was issued on the day the transcript was recorded. On that day the execution defendant owned the land in controversy, and she was a resident householder. On the 3d of March the execution was levied on the land, and on that day the execution defendant filed a schedule and demanded that the land be exempted from sale. Appraisers were appointed and the land was appraised at four hundred dollars. Due return was made of the writ by the sheriff. Afterwards the execution debtor conveyed the land to the appellee. On the 7th day of July, 1885, and after the deed to the appellee had been recorded, the appellants ordered out an alias execution. This execution was levied on the land, and the land was sold on the 1st day of August, 1885, to Andrew Hubler.

We have no doubt that the trial court was right in giving judgment in favor of the appellee. An execution defendant may sell property that the law exempts from execution, and his grantee will acquire a valid title. In fact, a judgment creditor does not obtain any enforceable claim upon property which the law declares shall be exempt from seizure. He has no right to seize or sell such property, and he can not successfully complain of any disposition that the debtor may make of it. The rule, as now established, and it is the only rule defensible on principle, is that the debtor holds the exempted property absolutely and entirely free from the claims of creditors. *Blair v. Smith*, 114 Ind. 114 (126); *Dumbould v. Rowley*, 113 Ind. 353; *Eiler v. Crull*, 112 Ind. 318; *Barnard v. Brown*, 112 Ind. 53; *Faurote v. Carr*, 108 Ind. 123; *Burdge v. Bolin*, 106 Ind. 175 (55 Am. Rep. 724); *Sannoner v. King*, 49 Ark. 299 (4 Am. St. Rep. 49). Property not subject to an execution is not subject to its lien. *Edwards v. Thompson*, 85 Tenn. 720 (4 Am. St. Rep. 807). As the execution debtor had a right to sell the land she had claimed as exempt, the sale and conveyance to the appellee invested him

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with a title against which the claims and liens of creditors have no force. His title is paramount, and prevails. As he had title, and as his deed was of record, Hubler, when he bought at the sheriff's sale, bought with notice. Nor was this the only notice he had, for an examination of the proceedings on which his title is founded would have informed him that the land was exempt from execution. He had the means of knowledge, and in legal contemplation had knowledge.

The appellee was not bound to do more than record his deed. He was under no obligation to keep watch of the proceedings of the judgment creditors. He had a duly recorded deed, and this drew possession and gave notice. He was not bound to oppose the issue of executions, or to secure additional schedules from his grantor.

Judgment affirmed.

Filed March 28, 1889.

118	114
118	280
118	509
120	487

118	114
126	78

118	114
150	363

118	114
153	616

118	114
167	230

118	114
1169	16

No. 13,568.

WAGNER ET AL. v. THE TOWN OF GARRETT.

PLEADING.—Ordinance.—Complaint Upon.—In a complaint predicated upon a town ordinance, it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out in or with the complaint so much of the ordinance as relates to the action.

SAME.—Sufficiency of Complaint.—Looking to Exhibited Ordinance.—The ordinance violated gives the right of action, and is so far the foundation of the suit that a copy filed with the complaint will be looked to in considering whether a demurrer was correctly overruled, without other averment than that the ordinance "is attached to and made a part of the complaint."

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MUNICIPAL CORPORATION.—Town.—Intoxicating Liquors.—License.—A town has the right to limit the licenses issued by it for the sale of intoxicating liquors to such persons as have procured and hold a license from the board of county commissioners.

SAME.—Statute.—Discrimination in Granting Licenses.—Who May Complain.

—The validity of a statute can be questioned only by persons who are prejudiced by it; and hence a male inhabitant of this State can not assail the statute regulating the granting of licenses to venders of intoxicating liquors on the ground that the exclusion of women and non-residents from participation in its benefits is an unjust discrimination.

SAME.—Ordinance Valid in Part.—The fact that an ordinance regulating the licensing of venders of intoxicating liquors requires a license for the sale of a liquor which is not the subject of municipal regulation, does not invalidate the ordinance so far as it relates to other liquors.

SAME.—Sale of Fermented Cider.—Right to Exact License.—It seems that the sale of fermented cider, which is an intoxicating liquor, is a proper subject of municipal regulation.

From the DeKalb Circuit Court.

W. L. Penfield, for appellants.

E. D. Hartman and *L. Covell*, for appellee.

MITCHELL, J.—The town of Garrett complained of Wagner and Zeek for having violated sections 1, 4 and 7 of one of the general ordinances of the town, which made it unlawful for any person, either directly or indirectly, to sell any spirituous, vinous, malt or other intoxicating liquors in a less quantity than a quart at a time, within the corporate limits, without being duly licensed. It is charged in the complaint that the defendants violated the above sections by selling intoxicating malt liquor and whiskey to persons named, in a less quantity than a quart, on several days named, without having first obtained a license so to do, according to the provisions of the ordinance, a copy of which is attached to and made a part of the complaint. A penalty of fifty dollars is prescribed for each and every violation of the ordinance.

In a complaint predicated upon a town ordinance, it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out in or with

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the complaint so much of the ordinance as relates to the action or prosecution. *Clevenger v. Town of Rushville*, 90 Ind. 258; *Vinson v. Town of Monticello*, ante, p. 103. It is averred that the ordinance violated is "attached to and made a part of the complaint," and we find from the record that a copy was so attached and filed. The ordinance violated gives the right of action, and is, therefore, so far the foundation of the suit as that a copy filed with the complaint will be looked to in considering whether a demurrer was correctly overruled, without other averments than those above set out. The complaint was sufficient.

It is next contended that the ordinance is void, because it makes provision for the granting of licenses to sell within the corporate limits only to such persons as have procured and hold a license from the board of commissioners of DeKalb county. Hence it is argued, since section 5314, R. S. 1881, authorizes the county commissioners to grant licenses only to male inhabitants of the State, the ordinance results in an unjust discrimination against women and non-residents.

Assuming, for the purposes of this case, that only male inhabitants of the State are entitled to obtain license to retail intoxicating liquors in a less quantity than a quart—*Ex Parte Laboyteaux*, 65 Ind. 545; *Murphy v. Board, etc.*, 73 Ind. 483—we are nevertheless constrained to hold, since it appears that the defendants are male inhabitants of this State, and, therefore, presumably entitled to a license if they had chosen to make application therefor, that they can not thus become the champions of others who are supposed to be unjustly discriminated against. If we should grant that women and non-residents have equal constitutional rights, in respect to engaging in the sale of intoxicating liquors, with male inhabitants of the State, it might follow that as to those who were injuriously affected, or against whom the ordinance discriminates, it would be invalid, while as to those to whom the ordinance assumes to grant a special privilege it would

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be entirely valid. Since women and non-residents have so far waived any constitutional right they may have in respect to selling intoxicating liquors, we content ourselves for the present with holding that as the appellants are confessedly of those who enjoy the monopoly which the ordinance secures, they must take the privilege with the burdens which attend it. When a case arises in which a woman or a non-resident is refused a license because of sex or non-residence, we will consider the question. Courts will not listen to those who are not aggrieved by an invalid law. Accordingly it has been held that a State law which excluded colored persons from service on grand and traverse juries deprived them of the equal protection of the law, but that a white person could not complain of the statutory exclusion. *Commonwealth v. Wright*, 79 Ky. 22 (42 Am. Rep. 203).

So it has been held that a white person could not raise the question whether the exclusion of negroes from participation in the benefits of the common school system was not a violation of the State Constitution. *Marshall v. Donovan*, 10 Bush, 681.

This is agreeable to the principle that only those who are prejudiced by an unconstitutional act will be heard to make objection to it. *Smith v. McCarthy*, 56 Pa. St. 359; Cooley Const. Lim. (5th ed.) 163, 164.

The appellants, being strangers so far as respects those whose rights are supposed to be injuriously affected by the law in question, do not occupy an attitude which authorizes them to ask the court to declare void a statute under which one of the most important police powers of the State is exerted. Cooley Const. Lim. (5th ed.), p. 197, note.

It is said that the requirement of the ordinance that the applicant for a town license shall hold an unexpired license issued by the board of commissioners is arbitrary and unwarranted, and that the statute does not authorize such discrimination. The statute confers power upon boards of trustees of incorporated towns to license, regulate and restrain

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the sale of spirituous, vinous, malt and other intoxicating liquors within their respective corporations. It is a reasonable regulation to require those who apply for a town license to first obtain a license from the board of commissioners, as required by the law of the State. Persons who obtain license from the county boards may be presumed to have shown their fitness to be trusted with the sale of intoxicating liquors, before a tribunal where the right of remonstrance is secured. Towns are not provided with the machinery for prosecuting inquiries into the character and fitness of applicants as are boards of commissioners, and so it is a reasonable exercise of the power to regulate and restrain to require that the applicant shall have complied with the law of the State by securing a license from the board of commissioners of the county.

An ingenious argument is submitted to prove that towns have no power to exact a license for the sale of fermented cider, although it is conceded to be an intoxicating liquor. The appellants say, in effect, that they desired to quit the business of selling intoxicating liquors generally, and confine themselves exclusively to the sale of fermented cider, which, though an intoxicating drink, they claim that they had the right to sell without license. They contend, however, that the town, by its ordinance, exacted a license for the sale of any and all intoxicating liquors, which included fermented cider, and that hence the ordinance was invalid not only as respects the sale of cider, but as respects malt liquor and whiskey, the particular drink which the appellants are alleged to have sold without license. We dissent from the premise, that the sale of fermented cider of an intoxicating character is beyond municipal regulation or restraint, but even if that were so, the conclusion would not follow that the ordinance would not be effectual as applied to the sale of other intoxicants. The appellants have no right to sell whiskey, beer and other intoxicants in defiance of the ordinance, even though it should turn out that the town had no

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right to exact license for the sale of fermented cider. The appellants' are not charged with the sale of cider in violation of the ordinance. When such a case arises we will decide it. There is no error.

The judgment is affirmed, with costs.

Filed March 27, 1889.

No. 13,302.

CAMPBELL ET AL. v. THE BOARD OF COMMISSIONERS OF
MONROE COUNTY.

FREE GRAVEL ROAD.—*Order Directing Reassessment.*—*Right of Appeal.*—An appeal will lie from an order of the board of commissioners directing a reassessment to pay the expense of constructing a free gravel road.

SAME.—*County Auditor.*—*Authority to Increase Assessment.*—*Ratification.*—The county auditor has no authority to increase an assessment beyond the sum ascertained and assessed as benefits in due course of law, and his act in doing so is not validated by a mere ratification thereof by the board of commissioners.

SAME.—*Statute Construed.*—Section 5096, R. S. 1881, must be construed as meaning that the auditor can only add to the assessment when it appears that the addition will not make the assessment exceed the benefits ascertained and reported in compliance with the statute.

From the Monroe Circuit Court.

M. F. Dunn, G. G. Dunn, W. H. East, E. Corr and M. M. Dunlap, for appellants.

J. H. Loudon, W. P. Rogers, J. W. Buskirk and — *Buskirk*, for appellee.

ELLIOTT, C. J.—The appellee's counsel insist that there can be no appeal from the order of the board of commissioners directing a reassessment to pay the expense of constructing a

118	119
130	518
118	119
137	359
118	119
143	513
118	119
153	281

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free gravel road. In this they are in error. The board has no authority to make a reassessment without notice, and upon notice the land-owners are entitled to come in and defend. *Board, etc., v. Fullen, post*, p. 158; *Board, etc., v. Fahlor*, 114 Ind. 176; *Abbett v. Board, etc.*, 114 Ind. 61; *Board, etc., v. Fullen*, 111 Ind. 410; *Board, etc., v. Gruver*, 115 Ind. 224. The notice of the intention to make a reassessment does not, however, bring before the court the validity of the original assessment, for that is adjudicated by the judgment rendered in the original assessment proceedings, but it does bring before the court all questions legitimately connected with the second assessment. In order to entitle the board to make a reassessment notice is essential, for in all proceedings affecting property rights notice is essential to constitute due process of law. *Kuntz v. Sumption*, 117 Ind. 1. The proceedings in the matter of the reassessment are founded on the second notice, and in the proper case judgment may be rendered directing a reassessment, and where there is a judgment there is a right of appeal.

The controlling facts are embodied in the special finding, of which we make a synopsis: On the 1st day of May, 1884, a petition was filed praying for the construction of a free gravel road; notice was given, and judgment was entered directing the construction of the road and the assessment of benefits. On the 18th day of February, 1886, the auditor discovered that the benefits were insufficient to pay the expense of constructing the road, and called a meeting of the board of commissioners in special session for the 18th day of February, 1886. On that day the board convened and the appellants appeared and remonstrated against making any addition to the original assessment. The original assessment was \$10,170.33 less than the expense of constructing the road, and to meet the deficiency forty-five per cent. was by the auditor added to the original assessment of benefits. The addition of the forty-five per cent. was made by the auditor previous to the meeting of the commissioners, was approved,

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and the order of the board was declared to be merely advisory. It thus appears that it was the judgment of the auditor that determined the reassessment, and not that of the board.

We are of the opinion that the auditor has no authority to increase an assessment beyond the sum ascertained and assessed as benefits in due course of law. Section 5096, R. S. 1881, must be construed as meaning that the auditor can only add to the assessment when it appears that the addition will not make the assessment exceed the benefits ascertained and reported in compliance with the statute. The auditor can not determine the benefits, nor, indeed, any other purely judicial question. To hold otherwise would be to invest the auditor with power arbitrarily, without notice, and without viewers, to add to the burdens of the land-owners, and this would be to violate some of the plainest principles of constitutional law. If the auditor may add forty-five per cent. on his own motion, and without notice, he may, on the same theory, double the assessment. Certainly it was not contemplated that he should have any such power. It would be rank injustice to land-owners to concede him such authority, for it might well be that the assessment thus increased would greatly exceed the benefits to the land. It would, at all events, deprive the land-owners of the constitutional right to have benefits assessed by due process of law. It is too well settled to admit of doubt that no greater sum than the benefit which accrues can be assessed against the land. Proceedings like these are only sustainable on the ground that the land receives a benefit equal to the assessment. *Board, etc., v. Fullen*, 111 Ind. 410 (420).

The question with which we are here concerned was not presented in *Kirkpatrick v. Pearce*, 107 Ind. 520. The court thus stated the question before it for decision: "The case before us involves the question as to when the assessments become liens upon the lands assessed. Do they become liens at the time the final order is made by the county board con-

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firming the report by the committee, or when the assessments are entered upon the special duplicate by the county auditor, or do the liens relate back and attach as of the first of April, as ordinary general taxes?" It is obvious that no such question as that here presented could have arisen in the case cited, for there the action was by a grantee against a grantor upon a covenant of warranty, and the only question was as to the time the lien of the assessment fastened on the land. The only evidence there adduced was the deed and the duplicate, and this was held not sufficient to show a valid assessment.

In *Kirkpatrick v. Pearce*, *supra*, it is said: "The action of the auditor in placing the assessments upon the duplicate, is ministerial," and this can only be correct upon the theory that there is nothing for him to do beyond making a computation upon the basis supplied by the facts judicially ascertained and established, for he can not determine to what extent lands are benefited, nor what items shall enter into the reassessment. In discussing the principle here involved, in the case of *Vandercook v. Williams*, 106 Ind. 345, Howk, J., speaking for the court, said: "In this case it is not claimed that the statute has invested the county auditor with the judicial power of the State, or has authorized such auditor to exercise any of the functions of the judicial department of the State government. If the statute had invested the county auditor with judicial power, or had authorized such auditor to exercise judicial functions, in the discharge of any of the duties imposed on him by law, it is certain that the statute, to that extent, would have been unconstitutional and void. It has been uniformly held by this court that judicial officers only can exercise judicial powers or functions. *Wright v. Defrees*, 8 Ind. 298; *Waldo v. Wallace*, 12 Ind. 569; *Columbus, etc., R. R. Co. v. Board, etc.*, 65 Ind. 427; *Shoultz v. McPheeters*, 79 Ind. 373; *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. Rep. 162); *Elmore v. Overton*, 104 Ind. 548; *Pressley v. Lamb*, 105 Ind. 171." We apply

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this elemental rule here, and adjudge that the auditor had no authority to increase the assessment originally made, as he assumed to do. Had the assessment been increased by the judgment of the board, quite another question would have been presented, but it affirmatively appears that they merely ratified the action of the auditor. They could not, of course, delegate to him any such authority, for judicial powers can not be delegated. *Entick v. Carrington*, 19 How. St. Tr. 1063; *State v. Jefferson*, 66 N. C. 309; *Van Slyke v. Trempealeau County, etc., Ins. Co.*, 39 Wis. 390 (20 Am. Rep. 50); *Conroe v. Bull*, 7 Wis. 408; Broom Legal Maxims, 841.

Judgment reversed, with instructions to sustain the appellants' motion for a new trial, and for proceedings in accordance with this opinion.

Filed March 26, 1889.

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123	580
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148	220

No. 13,675.

ROUT v. NINDE ET AL.

CHANGE OF VENUE.—*Motion for.*—*Duty of Court.*—Where, in a civil case, a motion for a change of venue from the county is made, supported by an affidavit in compliance with the statute, it is the imperative duty of the court to grant the change.

From the Adams Circuit Court.

C. J. Lutz and *J. W. Headington*, for appellant.

R. S. Peterson and *E. A. Huffman*, for appellees.

OLDS, J.—This is an action by the appellees against appellant on an account for services rendered by appellees as

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attorneys for appellant. There was a trial, finding and judgment for appellees. Appellant filed a motion for a new trial, which was overruled, and exceptions reserved by appellant. The ruling of the court on the motion for a new trial is assigned as error. Before the trial, and during the pendency of the cause in the Adams Circuit Court, at the November term, 1886, the appellant moved the court for a continuance, and filed his own affidavit in support of the motion, which motion for a continuance was overruled, and appellant at the time excepted to the ruling. At the same term appellant moved the court for a change of venue from the county of Adams, which motion for a change of venue was supported by the affidavit of the appellant, and was also overruled and exceptions reserved by appellant. The rulings of the court on the motions for a change of venue and for a continuance were assigned as reasons for a new trial. It is only necessary for us to consider the question presented on the ruling of the court on the motion for a change of venue. The affidavit states that the appellant is the defendant in the cause, and that he can not have a fair and impartial trial of said cause in the county of Adams, for the reason that the plaintiffs have an undue influence over the citizens of said county. The affidavit is in compliance with the statute authorizing a change of venue in civil actions, and it was error for the court to overrule the motion for a change of venue.

The statute in force does not permit a counter-showing to be made, and it makes it imperative on the court to grant a change of venue on proper affidavit being filed. Whether the statute operates to promote or retard the dispensing of justice, or whether its provisions are wise or unwise, is not for the court to determine. It is within the power of the Legislature to enact such a law, and having done so, it is imperative on the court, in civil actions, to grant a change on proper affidavit being filed in support of the motion for a change of venue.

It is suggested by counsel in argument, that there was a

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rule of court, at the time the court made the ruling on the motion, governing the time of filing affidavits for changes of venue, and that the affidavit in this case was not filed within the time allowed by such rule; but the rule is not set out in the bill of exceptions, nor does it appear in the record in any manner so as to be considered by this court.

For the error in overruling the motion for a change of venue the judgment must be reversed.

Judgment reversed, at the costs of appellees.

Filed March 27, 1889.

No. 13,223.

ROBINSON v. SHANKS ET AL.

ARBITRATION.—Award.—Setting Aside of.—Cause for.—An award will be set aside when the arbitrators, after their appointment, and while engaged in the discharge of their duties, partake of hospitalities, in the way of lodging and meals, from one of the litigants. The same influences or misconduct that would avoid the verdict of a jury, ought to avoid an award.

SAME.—Attentions Bestowed on Arbitrators.—Influence of, Immaterial.—It is immaterial whether the arbitrators were in fact influenced by such attentions or not. Their acceptance of them is sufficient to invalidate the award.

SAME.—Assessment of Costs.—Where an award is set aside on account of the misconduct of one of the parties, it is proper to tax such party with the costs made in the trial before the arbitrators.

SAME.—Oral Testimony of Arbitrators.—When Admissible.—Where affidavits of arbitrators are filed in support of the award they have made, the court, in its discretion, may call the arbitrators and examine them orally in relation to the matters about which they have testified in their affidavits.

SAME.—Setting Aside of Reference.—Trial by Court.—Where a case is sub-

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mitted to certain arbitrators by name, and their award is set aside, it is the duty of the court, unless the parties agree upon other arbitrators, to set aside the reference and try the cause in its regular turn.

EVIDENCE.—*Admissibility of.*—*Must be Embraced Within the Issues.*—Under a complaint seeking a recovery for damages occasioned by the overflowing of the plaintiff's land, washing away tiling, etc., evidence is not admissible as to any expense incurred by the plaintiff in his efforts to keep the water off of his land, such an issue not being embraced within the pleadings.

SAME.—*Irrelevant Testimony.*—*Rebuttal of.*—If testimony is erroneously admitted in rebuttal of irrelevant testimony introduced by the other party, it is a harmless error, for which the cause will not be reversed.

SAME.—*Conflicting Evidence.*—*Setting Aside of Verdict.*—Where the evidence in a cause is conflicting, the verdict will not be disturbed on the weight of the evidence.

WATERCOURSE.—*Obstruction of.*—*Instructions.*—As to what constitutes a running stream or watercourse, for the obstruction of which an action will lie, see instructions set forth in opinion.

INSTRUCTIONS.—*Must be Considered Together.*—Instructions are to be considered as a whole, and not in detached portions.

From the Dearborn Circuit Court.

J. K. Thompson, for appellant.

N. S. Givan, for appellees.

COFFEY, J.—This suit was brought by the appellant against the appellees in the circuit court of Dearborn county, the complaint charging that the appellant and the appellee Rachel Shanks are adjoining land-owners; that there is an ancient watercourse, called Leeper's run, passing through said appellee's land and across the line dividing their lands; that for more than twenty years the water discharged from said watercourse was carried off by an artificial canal, constructed by appellant's grantor on appellant's land, into another stream called Salt Fork of Tanner's creek, thus protecting appellant's land from overflow; that, on the 1st day of November, 1883, the appellees unlawfully and wrongfully, at a point ten to fifteen rods above where said Leeper's run crosses the line dividing the lands of appellant from the lands of appellee Rachel, and empties into said artificial canal, obstructed

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said Leeper's run by constructing a dam across the bed and channel thereof, by filling the same with brush and stones, and by digging an artificial channel so as to conduct the water flowing down said watercourse to a point on said dividing line about eight rods west from where the natural channel of said run crossed the same, and wholly diverting the water discharged therefrom away from said artificial canal; that, by reason of diverting said watercourse, the water discharged therefrom has been thrown upon the land of the appellant, rendering five acres thereof, worth five hundred dollars, wet and marshy and incapable of cultivation, washing away the soil, and in hard rains washing stones upon the surface thereof, and washing away tiles placed therein to drain the same, and during the current year, by reason of the overflow of said land, caused by said diversion, appellant lost five acres of corn of the value of one hundred dollars.

The appellees filed a general denial to this complaint, which put the cause at issue. The cause, being at issue, was by agreement of the parties, made in open court and entered of record, referred to James McKinney and Ferris Nowlin, as arbitrators, with power to choose an umpire. At the same time said McKinney and Nowlin chose Isaac B. Ward as such umpire, which choice was at once entered of record. The arbitrators were authorized by the order of reference not only to try the matters involved in the issues, but also to determine and locate the division line between the lands of the parties, and to call to their assistance for that purpose, if necessary, a practical surveyor. The parties to the suit, by the order of the court, were not permitted to be present while the arbitrators were engaged in viewing the premises or locating the dividing line.

Said arbitrators and umpire filed their report fixing the boundary line between the parties, and finding against the appellant on the claim set up in his complaint. They awarded

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that each party should pay one-half the costs of the suit and arbitration.

The appellees filed a motion to set aside the award and for a new trial, alleging, as cause therefor, misconduct of the appellant, in this: That in violation of the order of the court he was present while said arbitrators were viewing the premises and establishing the boundary line, and gave counsel and direction as to the same; that he induced one of said arbitrators to go to his house and remain over night and partake of his hospitality while engaged in hearing said cause, and that he induced two of said arbitrators, while engaged in hearing said cause, to go with him to the hotel and take dinner with him at his expense.

Affidavits were filed by the appellees in support of their motion. Appellant moved to strike out and reject these affidavits, but the court overruled the motion, and he excepted. The appellant then filed counter-affidavits, and upon the final hearing of the motion the court sustained the same, and set aside the award, to which appellant excepted. On motion of the appellees the order referring the cause to arbitrators was set aside, and the cause ordered to stand for trial, to which appellant excepted.

The cause was then tried by a jury, resulting in a verdict for the appellees. Over a motion by the appellant for a new trial the court rendered judgment on the verdict.

The appellant assigns as error:

1st. that the court erred in sustaining the motion of the appellees to set aside the award of the referees.

2d. That the court erred in its judgment setting aside the award of the referees, and especially that part of it rendering judgment for costs against the appellant before the referees.

3d. That the court erred in refusing to modify the judgment as prayed for by the appellant.

4th. That the court erred in overruling the motion of the appellant to reject the affidavits of Maggie Shanks, Eliza

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Shanks, Henry Blasdell, Lewis Nowlin and Harry Nowlin, filed with the motion to set aside the answer.

5th. That the court erred in overruling the objection of the appellant to oral testimony of the referees, McKinney and Ward, to impeach the award.

6th. That the court erred in receiving the oral testimony of James Liddell to impeach the award.

7th. That the court erred in setting aside the order of reference to James McKinney, Isaac B. Ward and Ferris Nowlin.

8th. That the court erred in rendering judgment for the costs of the trial before the referees against the appellant.

9th. That the court erred in ordering the trial of said cause by a jury against the order referring the same for trial to James McKinney, Isaac B. Ward and Ferris Nowlin.

10th. That the court erred in overruling the motion of the appellant for a new trial.

As the first nine assignments of error relate to the matter of setting aside the award and ordering the cause to stand for trial as if no reference had been made, it is not improper to consider them together.

In resisting the motion to set aside the award, the appellant filed the affidavits of the referees McKinney and Ward in support of their award. On the final hearing of the motion, the court permitted the appellees to call these arbitrators and examine them orally, in open court, over the objection of the appellant.

By the affidavits filed by the appellees and by the examination of these arbitrators, it is made to appear that the appellant, on one occasion, while the arbitrators were engaged in the discharge of their duties on the premises, brought from his residence a lunch, of which they all partook. The arbitrator McKinney stayed at the house of the appellant several nights while engaged in the performance of his duties as arbitrator. The arbitrator Ward, while engaged in hear-

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ing the testimony in the cause, on one occasion took dinner at the hotel at the expense of the appellant.

By section 851, R. S. 1881, any matter involved in a pending suit may be referred, by consent of the parties, by rule of the court, to certain persons mutually chosen by them in open court, if such matter might have been the subject of arbitration.

When the report of such referees is returned, under the hands of the referees, or a majority of them, it is entered on the order-book and has the same effect and is as available in law as the verdict of a jury. The same influences or misconduct that would avoid the verdict of a jury ought to avoid the award.

In the case of *Moshier v. Shear*, 102 Ill. 169 (40 Am. Rep. 573), one of the three arbitrators, after his appointment, conversed fully on the merits of the dispute with one who had previously acted as an arbitrator in respect to the same matter, and whose award had been set aside. For this reason the award was set aside.

In the case of *Catlett v. Dougherty*, 20 Rep. 714, the party in whose favor the award was made, made a statement to one of the arbitrators, in the absence of the other party, which was intended to influence the award, and for that reason the award was held invalid. In that case the court says that "It is unimportant whether the arbitrator was in point of fact improperly influenced by the conduct of the defendant or not. * * * Courts will not enter upon an inquiry of how far such conduct may in fact have produced beneficial results, but will, at the instance of the party intended to be thus injured, set aside the award."

Conceding that no wrong was intended, still it was highly improper that one of the arbitrators should stop with the appellant and partake of his hospitality while engaged in hearing and considering the case; and it was also improper that another of the arbitrators should take a meal at the hotel at his expense. It is not difficult to believe that the appellant,

by these attentions to the arbitrators, intended thereby to influence their judgment in his favor. Whether his conduct had this effect or not we will not inquire. Under the circumstances we do not think the court erred in setting aside the award.

As the award was set aside on account of the misconduct of the appellant, we think it was proper to tax him with the costs made in the trial before the arbitrators. By reason of his conduct the time and expense before them became valueless, and we see no good reason why he should not pay this useless expense.

The appellant filed the affidavits of McKinney and Ward, two of the arbitrators, in support of the award. On the final hearing of the motion the court permitted the appellees to call these arbitrators and examine them orally.

It is doubtless true that a juror can not be heard to impeach his verdict. Perhaps the same rule would apply to an arbitrator whose award is attacked. In this case, however, the testimony of the arbitrators had been heard in support of the award. As the object of all judicial investigation is to ascertain the exact truth, we think that if the court had reason to believe that the affidavits of the arbitrators did not state the whole truth, it was in its discretion to call and examine them in relation to the matters about which they had testified in their affidavits. In this case there does not seem to have been any abuse of discretion in this regard.

The reference in this case was to certain arbitrators by name. When the award made by them was set aside it would have been improper to refer the case back to them for a new trial. Unless the parties agreed upon other arbitrators there was nothing left for the court to do but to set aside the reference and try the cause in its regular course. We do not think the court erred in its action in setting aside the order referring the cause to arbitrators, and ordering it tried in the usual course of the business of the court.

As the affidavits filed with the motion to set aside the

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award of the arbitrators tended to prove misconduct on the part of the appellant and to sustain the charges contained in the motion, the court did not err in refusing to strike them out. They were proper matters to be considered by the court on the final hearing of the motion.

It appears from the testimony in the cause that at a time prior to the commencement of this suit, some person filled the bed of Leeper's run, at a point north of the line dividing the lands of the parties to this suit, with brush, stones and dirt, and that by reason of such obstruction the water flowing down said run was diverted from its ordinary course and struck said line at a point some rods west of where it otherwise would have crossed it. The appellant at this point constructed a solid board fence in order to stop the flow of water and prevent it from overflowing his land. On the trial of the cause the appellant offered to prove the cost of constructing this fence, which the court, on the objection of the appellees, excluded, and the appellant excepted. It is not necessary for us to decide whether this, in a proper case, would be an element of damages. It is sufficient to say that in this case the matter sought to be proved is not embraced in the complaint. The complaint seeks a recovery for the damages occasioned by overflowing the appellant's land, washing away tiling, washing stones upon the land, and for injury to the crops occasioned by the overflow, and does not embrace any expenses incurred by the appellant in his efforts to keep the water off his land. We do not think the court erred in excluding this evidence.

Over the objection of the appellant the appellees were permitted to prove by certain witnesses that they had seen the appellant and his hands digging at a point north of the line dividing the lands of the parties, and near the board fence erected by the appellant. The theory of the appellees was that the appellant, or his hired men, had caused the diversion of water of which he was complaining. Under this theory the appellees had the right to prove, if they could do

so, either by direct or by circumstantial evidence, that they were not responsible for the damages sustained by the appellant. How far the evidence admitted tended to establish the theory of the appellees was a question for the jury. It was certainly competent for the purpose for which it was admitted.

During the trial the appellant called one Gridley, by whom he proved that some years prior to the trial he (Gridley) had made a survey of the line dividing the land of the appellant and the appellees. In his testimony the witness referred to certain notes and recorded land-marks in the books of his office. In rebutting, with a view of contradicting this witness, the appellees, over the objection of the appellant, were permitted to read in evidence what purported to be a transcript of certain field-notes from the surveyor's office found in the recorder's office.

As the line dividing the lands of the parties was not involved in the issues between them in this suit, we are unable to see the relevancy of any of this evidence. If it was error to admit these field-notes in rebuttal to irrelevant testimony introduced by the appellant, we think it was a harmless one, for which the cause should not be reversed.

The court, of its own motion, gave to the jury the following instruction :

" 1st. The complaint asks damages against the defendants for obstructing the flow and diverting the course of an ancient watercourse. To constitute a running stream or watercourse, for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it will not flow continually; it may sometimes be dry; it must flow in a definite channel, having a bed, sides or banks, and must usually discharge itself into some other stream or body of water; it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary cause; it does not include the water flowing in hollows or ravines in

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land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower lands, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, watercourses, for the obstruction of which an action will lie; and if you believe from the evidence in this cause that the only flow of water in said run or ravine, described in the complaint, was rain falling upon and snow melting upon and running down from the surface of an entire tract of higher land into a hollow or ravine, and by such course carried to lower land, then said Leeper's run was not a watercourse within the meaning of the law, and then it would be your duty to find for the defendants."

It is objected to this instruction that it is too refined and restrictive in the application made to the particular case. There is evidence, however, in the record to which it is applicable. It announces the law substantially as it is laid down in the case of *Hill v. Cincinnati, etc., R. W. Co.*, 109 Ind. 511. See, also, *Hebron G. R. Co. v. Harvey*, 90 Ind. 192.

Some of the other instructions given by the court are severely criticised by counsel, but, under the well known rule that instructions are to be considered as a whole, and not in detached portions, we think they fairly state the law as applicable to the evidence in the cause. *Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278; *Schlichter v. Phillipy*, 67 Ind. 201.

The evidence in the cause was conflicting, and the jury might well have found for either party. We can not disturb the verdict on the weight of the evidence. There is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed March 27, 1889.

The Logansport and Pleasant Grove Turnpike Company v. Heil.

No. 13,423.

THE LOGANSPORT AND PLEASANT GROVE TURNPIKE
COMPANY v. HEIL.

118	135
137	549
139	194

EVIDENCE.—Admissions against Interest.—The admissions of a party against his interest are competent as independent and substantive evidence, and can not be limited to the question of credibility.

SAME.—Party May not Introduce His Own Declarations.—Where the defendant introduces self-disserving admissions of the plaintiff, the latter can not give his own declarations in evidence in support of his case.

From the Cass Circuit Court.

E. S. Daniels, A. G. Jenkins, S. T. McConnell and D. B. McConnell, for appellant.

J. C. Nelson, Q. A. Myers, R. Magee, G. W. Funk and D. C. Justice, for appellee.

ELLIOTT, C. J.—The appellee testified that one of the wheels of the wagon in which he was riding ran into a deep hole in the turnpike of the appellant upon which he was driving; that the wagon was upset and he was thrown out and injured. One of the witnesses for the appellant testified that the appellee told him that he had upset his wagon by making “too short a turn,” and others testified that he told them that he upset the wagon by “running one of the wheels against a large stone.” In reply the appellee introduced evidence of statements made by himself the day after the accident occurred corresponding with his testimony on the witness stand.

The trial court erred in admitting in evidence these declarations of the appellee. In giving an account of the accident the appellee was testifying as to facts and was assuming to state facts. In disproving by his own admissions his statements on the witness stand, the appellant did not merely impeach his credibility, but gave evidence which tended to

disprove the facts he assumed to state. The testimony given by the witnesses who testified as to his admissions was not offered or received as impeaching evidence, but as evidence of the admissions of a plaintiff. Where a party makes admissions they are accepted as original evidence, upon the ground that the admissions of a party against his interest are made because they truthfully embody the facts, and they are, therefore, substantive proof of the facts admitted. They relate to the facts themselves as facts, and not merely to the question of the trustworthiness of the party as a witness. If the appellee had not testified at all, his admissions would have been competent as original evidence. The admissions tended to prove that the fact was that the accident did not occur in the manner described by him in his testimony, but in an entirely different manner. These admissions against his interest were evidence that the facts stated as the cause of action did not exist, and, therefore, evidence of these admissions did much more than affect the question of credibility. *Blossom v. Barrett*, 37 N. Y. 434; *Lucas v. Flinn*, 35 Iowa, 9; *Hodges v. Bales*, 102 Ind. 494. The cases which declare that where a witness is impeached by evidence of contradictory statements made out of court, he may be sustained by evidence of statements made about the same time corresponding with those made on the trial, are not in point. The case before us does not fall within the rule asserted in such cases as *Coffin v. Anderson*, 4 Blackf. 395, *Perkins v. State*, 4 Ind. 222, *Brookbank v. State, ex rel.*, 55 Ind. 169, and *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18. The rule which here applies is the general one that a party can not give his own declarations in evidence. *Denman v. McMahan*, 37 Ind. 241; *Hunt v. Roylance*, 11 Cush. 117 (59 Am. Dec. 140).

The instruction given by the court did not cure the error in permitting the plaintiff to prove his own declarations in support of his case, but, on the contrary, enhanced, rather than diminished, the effect of the erroneous ruling. The

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instruction reads thus: "The plaintiff in rebuttal introduced evidence of statements made by him in relation to matters in controversy at other times and places than those that the defendant claims that the plaintiff made in its defence. This evidence is to be considered by you only and alone with reference to the credibility of the plaintiff as a witness." The admissions of the plaintiff, as we have already said, were competent as independent and original evidence of the manner in which the accident occurred, and this instruction implies that the only effect of the admissions was to impeach the plaintiff's credibility as a witness.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial.

Filed March 27, 1889.

No. 13,712.

HYNEMAN v. ROBERTS.

REAL ESTATE.—*Parol Contract of Purchase.*—*Possession.*—*Quieting Title.*—*Complaint.*—*Motion in Arrest.*—A complaint to establish and quiet title alleged a parol contract of purchase and the payment of part of the consideration, and that the plaintiff "immediately upon said purchase entered into possession of said real estate and has since kept in possession."

Held, that the complaint is sufficient, as against a motion in arrest of judgment, to show that possession was taken under and by virtue of the contract.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

W. M. Land and J. B. Gamble, for appellee.

118	137
131	204
118	137
135	48

Hyneman v. Roberts.

OLDS, J.—This is an action to quiet title. The complaint is in one paragraph, and, omitting the caption, is as follows:

“ William A. Roberts, plaintiff, complains of Aaron Hyneman, defendant, and says that heretofore, in September, 1883, said plaintiff purchased of said defendant the following real estate in said county and State, to wit, lots 103 and 104 of the eastern enlargement of the town of Hazelton, and paid said defendant therefor all the purchase-money except one hundred and fifty dollars, but took therefor no conveyance or other writing from said defendant, and immediately upon said purchase entered into possession of said real estate, and has ever since kept actual and open possession, claiming to own the same; and plaintiff says that the said defendant, at divers times within the year last past, has denied, and still denies, the said sale, and asserts to the public that said plaintiff is not the owner and has not purchased said real estate, but that said defendant is the owner, and thereby places a cloud upon the plaintiff's title, and puts the same in dispute; and plaintiff says that said sum of one hundred and fifty dollars of the purchase-money as aforesaid is still due from plaintiff to defendant. Plaintiff therefore prays that he have judgment that he is the owner of said real estate, subject to the lien for the unpaid purchase-money, and that his title thereto be in all things quieted, and for all proper relief.”

There was an answer of general denial filed, and trial and judgment for appellee, the plaintiff below.

There was a motion by appellant in arrest of judgment, which was overruled, and appellant reserved an exception to the ruling, which ruling is assigned as error.

The only objection pointed out to the complaint in support of the motion in arrest is, that the complaint does not allege specifically that the plaintiff entered into possession of the real estate under and by virtue of the contract. The complaint alleges the contract, and that immediately thereafter plaintiff entered into possession, but it does not allege by what authority. It may be fairly inferred after verdict

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or finding and judgment, that the plaintiff entered into possession under and by virtue of the contract. The complaint alleges a contract of purchase and the payment of all the purchase-money except one hundred and fifty dollars, and that the purchaser immediately took possession of the real estate. It is fair to presume from these facts that the purchaser entered under the contract, and that it was so proven and the court so found. *Clegg v. Waterbury*, 88 Ind. 21; *Eberhart v. Reister*, 96 Ind. 478.

In the last case cited the court says: "Many defects which a demurrer would reach are cured by a verdict." *Jenkins v. Rice*, 84 Ind. 342; *Martin v. Holland*, 87 Ind. 105; *Puett v. Beard*, 86 Ind. 104; *Jones v. White*, 90 Ind. 255.

The court did not err in overruling the motion in arrest of judgment.

Judgment affirmed, with costs.

Filed March 28, 1889.

No. 13,558.

PURSLEY v. WIKLE.

118	139
124	501
118	139
137	193

DAMAGES.—*Exchange of Lands.*—*Fraud.*—*Contract.*—*Right of Action.*—An action to recover damages resulting from the fraudulent representations of the defendant in an exchange of lands is not based upon the contract of exchange, but upon the fraud by which the plaintiff was induced to enter into it. *Griffin v. Moore*, 52 Ind. 295, and *Coon v. Vaughn*, 64 Ind. 89, distinguished.

SAME.—*Costs.*—*How Adjudged.*—In such a case, the costs are to be adjudged as provided in section 592, R. S. 1881, and if the plaintiff recovers less than five dollars damages, he is entitled to recover no more costs than damages.

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COSTS.—Taxation of.—Motion for.—Practice.—Where the plaintiff is entitled to recover some costs, there is no error in overruling a motion to tax all the costs of the action against him.

From the Howard Circuit Court.

J. F. Morrison, R. Vaile and F. Cooper, for appellant.

C. E. Hendry, J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellee.

COFFEY, J.—The appellee filed his complaint in the circuit court of Howard county, alleging substantially the following facts: That, on the 4th day of February, 1878, he was the owner in fee and in possession of a certain tract of land in Howard county, Indiana, describing it, which had for many years been occupied by him and his family as a homestead; that defendant represented to him that he was the owner of one hundred and forty acres of land in the State of Illinois, and proposed to exchange his said land in Illinois for the plaintiff's said land in Howard county; that in order to induce plaintiff to accept said proposition and make said exchange, the defendant then and there represented and stated to the plaintiff that one hundred acres of his said land in Illinois consisted of a seventy-acre tract and a thirty-acre tract; that said seventy-acre tract was dry prairie land, situate on a fine public highway, and was within a few yards of a good railroad station; that the same was all inclosed and cut up into fields with first class rail fences in good condition; that the soil was dry, black loam, and that the whole seventy acres was in a high state of cultivation; that there was a good farm-house thereon, nearly new, and in a good state of preservation; that said thirty-acre tract was located within one-half mile of said seventy-acre tract, on the same public highway, and was well and heavily timbered with oak, ash, walnut and poplar timber of fine quality and size; that the remaining forty-acre tract was situate just three miles from said seventy-acre tract, and was fine, black, rich soil; that it was inclosed by a first class rail fence, and was divided up

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into three fields and was all in a fine state of cultivation; that there was a first class farm-house, and a fine apple orchard of good, healthy bearing apple trees, and stable and out-buildings on said tract; that the title to said land was perfect in him and unincumbered; that there was no break in it from the president down; that all said land was worth \$7,000, and would sell for that amount at any time; that the plaintiff had no knowledge of the quality or condition of said land or of the improvements thereon or the title thereto, except as stated to him by the defendant; that fully relying on said representations and statements so made to him by the defendant, and believing them to be true, he accepted the defendant's proposition, and that he and said defendant fully completed said trade according to the terms thereof; that after completing said trade the plaintiff learned, to his surprise, that said representations so made by the defendant to him were wholly false in this: That in truth and in fact said seventy-acre tract was not all inclosed and cut up into fields by first class rail fences in good condition, but, on the contrary, there were no inside fences at all, and the outside fencing was nearly rotted down; that on the north end and west side the fences were entirely gone; that the whole of said seventy acres was not in a high state of cultivation, but, on the contrary, no part of it was in a high state of cultivation, and not more than twenty acres of the same had ever been in cultivation; said land was not high, dry prairie land, situate on a public highway within a few yards of a good railroad station, nor was said soil dry, rich, black loam, but, on the contrary, was low, wet, white clay, situate more than a half mile from any road or highway, and more than three miles from any railroad station; that the only farm-house on said seventy-acre tract was a small shanty, one story high, sided up and down with undressed oak boards and covered with clapboards three or four feet long; that the same was not ceiled or plastered, had no windows, and the only door to the same was constructed of clapboards; that said house

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was wholly unfit to be inhabited; that said thirty-acre tract of land was situate more than three miles from said seventy-acre tract, was not on any public highway and had no timber on the same, except a few scrubby jack-oaks of no value; that said forty-acre tract was situate forty miles from said seventy-acre tract, and was in two separate tracts and was not owned by the defendant; that there was no building on the same, except a small log cabin very much dilapidated; that there was no orchard on the same of any value; that the fences on the same were almost worthless; that there was a valid mortgage lien on the same which plaintiff was compelled to pay, at an expense of \$450, to save said land; that said three tracts of land were not worth \$1,200, and that by reason of all said facts the plaintiff has been damaged in the sum of \$6,000.

So far as they affect the questions involved in this case, the allegations in the second paragraph of the complaint do not differ materially from the allegations in the first paragraph.

Upon the issues formed by a general denial to this complaint the cause was submitted to a jury, who returned a verdict for the plaintiff for one dollar.

Immediately after the return of said verdict, and before the rendition of judgment thereon, the defendant filed a written motion to tax all the costs in the case against the plaintiff, alleging as a reason therefor that the amount of the recovery was not sufficient to carry costs against the defendant.

The court rendered judgment on this verdict for the plaintiff for one dollar and for all the costs in the action. This judgment was rendered on the 14th day of November, 1885, but no action was taken on the above motion until the 29th day of October, 1886, when the same was overruled, and the question thereon was saved by the defendant by a proper bill of exceptions. It appears by this bill that the only questions tried in the cause were the questions of fraud set out in the complaint, and the amount of damages sustained by the plaintiff by reason of such fraud.

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At a subsequent date the defendant also filed a motion to modify the judgment as to costs, praying that the judgment be so modified as to adjudge all the costs in the cause against the plaintiff. This motion was overruled by the court, and the defendant excepted.

In the assignment of errors in this court the appellant calls in question the correctness of the rulings of the court below in overruling his several motions above set forth.

The statute of 1881 upon the subject of costs is as follows :

“Section 590. In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.

“Section 591. In actions for money demands on contract commenced in the circuit or superior courts, if the plaintiff recover less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter-claim pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs. * * * *

“Section 592. In all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question.”

It is contended by the appellant that the cause of action set out in the complaint is for a money demand on contract, and that, therefore, the appellee, to entitle him to a judgment for costs, must obtain a judgment for at least fifty dollars. As we have seen, the only question tried in the cause was the question of fraud set up in the complaint.

Fraud consists in an undue advantage taken of a party under circumstances which mislead, confuse or disturb the just results of his judgment, and thus expose him to be the victim of the artful, the importunate and the cunning. 1 Story Eq. Jur., section 251 ; *Turley v. Taylor*, 6 Baxter (Tenn.), 376. It is a tort, and is so treated by all the authorities. Ordinarily,

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the essence of a tort consists in the violation of some duty to an individual, which duty is a thing different from the mere contract obligation. *Rich v. New York, etc., R. R. Co.*, 87 N. Y. 382.

When the appellee discovered the fraud alleged in his complaint he was free to pursue either one of two remedies—he had the right to rescind the contract between him and the appellant, by tendering back, within a reasonable time, all he had received under its terms, or he had the right to stand by the contract and sue the appellant for the damages he had sustained by reason of the fraud. He chose the latter remedy, and in doing so he is not to be regarded as suing upon the contract. His action is based upon the fraud, the wrongful conduct of the appellant, by the means of which he was induced to enter into it.

We do not regard *Griffin v. Moore*, 52 Ind. 295, and *Coon v. Vaughn*, 64 Ind. 89, as being in point in this case. In the first case cited, it was held by a majority of this court that the action was based upon the implied contract of the defendant to take proper care of the horse in question, and in the latter case it was held that the complaint was based upon the implied contract of the defendant to properly treat the plaintiff, as a physician, having been employed to perform that duty. Nor do we regard the view here taken as being in conflict with the statute prescribing rules for construction. As we have seen, this action does not arise out of the contract between the parties, but rather out of the wrongful conduct of the appellant prior to the time the contract was entered into.

We do not think the law required the appellee to recover a judgment for fifty dollars before he could recover a judgment for costs. The judgment for costs in this case is governed by section 592. Under that section if the appellee recovered less than five dollars he was entitled to recover no more costs than damages. As to the reason for adjudging all the costs in this case to the appellant we have no infor-

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mation. If it was erroneously done, the court below was not asked to correct it.

We do not think the court erred in overruling the motion of the appellant to tax all the costs in the cause to the appellee, nor was it error to overrule the motion to so modify the judgment as to adjudge all the costs against him.

Judgment affirmed.

Filed Jan. 22, 1889; opinion modified March 28, 1889.

No. 13,623.

MITTEN v. KITT.

DEPOSITION.—*Publication After Trial has Commenced.*—A party has the right to have a deposition taken by him published after the trial has commenced, although it has been regularly on file for forty-two days.

SAME.—*Delay in Moving for Publication.*—As either party may move to publish a deposition, neither can complain of delay on the part of the other in making the motion.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellant.

J. C. Branyan, M. L. Spencer and W. A. Branyan, for appellee.

ELLIOTT, C. J.—A deposition taken by the appellant had been on file for forty-two days, when the appellant's counsel moved to publish it. This motion was not made until after the trial had commenced, and much of the evidence had been heard. The envelope containing the deposition was prop-

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erly addressed and it was duly filed. It was, therefore, among the files of the case, and either party had the right, as of course, to move to publish it, but neither was under any legal obligation to make the motion. The motion made by the appellant was denied. This was error. The appellant was, as we have said, under no obligation to move for the publication of the deposition. He deprived the appellee of no right in delaying his motion. He did nothing wrong. Having done no wrong and invaded no right, there is no valid reason apparent on the face of the record for depriving him of the evidence of his witness by refusing permission to publish the deposition. A party guiltless of wrong can not be justly adjudged to forfeit a right. If the appellee had been misled, or had been deprived of a right, the case would be different. The appellee, by his own inaction, postponed the opening of the deposition, and whatever other rights he may have had—and what rights he had are not here the subject of investigation—he certainly had no right to demand that the deposition should forever remain on file with the seals unbroken. As he did not avail himself of his right to move for publication, he is not in a situation to successfully complain of delay.

Judgment reversed.

Filed April 2, 1889.

Roquet, Administrator, v. Eldridge et al.

No. 12,714.

ROQUET, ADMINISTRATOR, v. ELDRIDGE ET AL.

WILL.—Legacy.—Specific and Demonstrative.—Ademption.—Married Woman.—

A father executed a will devising his homestead farm to two of his sons. To his four other children he bequeathed five hundred dollars each, to be paid in cash and to be in full of their interests in the homestead farm. The will contained a recital that the devises and bequests thus made were to be considered as a disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. Afterwards, and during the testator's lifetime, the devisees of the homestead farm furnished their father two thousand dollars, out of which he paid each of the four legatees five hundred dollars, and received from each a receipt, as follows: "Received from William B. Eldridge \$500, in consideration of my interest in his homestead farm, corresponding with his last will." At the death of the testator the homestead farm and personal property worth five hundred dollars constituted his entire estate.

Held, that the legacies were neither specific nor demonstrative, and that they were adeemed and satisfied by the payments made in the manner disclosed.

Held, also, that money paid to a married woman, in ademption of a legacy, produces the same legal result as if she were unmarried.

SAME.—What Constitutes an Ademption.—An ademption results where a parent, or other person standing *in loco parentis*, after having made a bequest, gives a portion to the child to whom the bequest is made equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*.

SAME.—Ademption of Specific or Demonstrative Legacies.—Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed.

From the Vigo Circuit Court.

C. F. McNutt, S. C. Stimson and R. B. Stimson, for appellant.

S. C. Davis and S. B. Davis, for appellees.

MITCHELL, J.—After the issues were joined in the court below the judgment appealed from was rendered upon an

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agreed statement of facts. The questions for decision arise out of the facts agreed upon, which, so far as they are material, are as follows: In November, 1863, William B. Eldridge executed his last will and testament, by the second clause of which he devised to his sons Hamilton Eldridge and Abram A. Eldridge his homestead farm, to be held by them jointly. To his daughters, Amanda and Cynthia, and to his sons William G. and Robert B., he bequeathed five hundred dollars each, to be paid in cash, which sums were to be taken and considered as in full of each of their respective interests in the homestead farm. The will contained a recital, the effect of which was that the devises and bequests thus made were to be considered as the disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. Afterwards, and during the lifetime of the testator, his sons Hamilton and Abram A. Eldridge, devisees of the homestead farm, furnished their father two thousand dollars in money, out of which he paid to each of the four legatees above named the sum of five hundred dollars, and received from each a receipt of the following tenor, viz.: "Received of William B. Eldridge \$500, in consideration of my interest in his homestead farm, corresponding with his last will."

One of the daughters was a married woman at the time she received the money and executed the receipt therefor as above. The testator died in February, 1881, having had but the six children named above. He had only about five hundred dollars in value of personal property, which, with the farm above mentioned, valued at about \$6,400, comprised his whole estate.

On behalf of the administrator with the will annexed, it is insisted that the sums paid to the several legatees by the testator in his lifetime constituted a satisfaction or ademption of the legacies provided by the will, while the legatees insist that the legacies are specific or demonstrative in their character, and that since it does not appear that the money

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paid them was raised out of, or derived from, the land comprised in the homestead farm, the payment did not work an ademption of the sums bequeathed by the will.

The legacies were, however, neither specific nor demonstrative. Speaking upon the subject of specific legacies the Lord Chancellor, in *Fielding v. Preston*, 1 De G. & J. 438, said: "There have been attempts, in various cases, to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed *in specie*."

A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee in specie. 2 Redfield Wills, 132; Rapalje & Lawrence Law Dict., tit. "Legacy."

Lord HARDWICKE said, in *Ellis v. Walker*, Amb. 309: "The court leans against considering legacies as specific." Unless, therefore, it appears that the money or thing to be transferred is so clearly identified and inherently described as that the legatee can say to the executor that all, or a portion of, the very fund or property in question was transferred by the will, the bequest will not be regarded as specific. *Sidebotham v. Watson*, 11 Hare, 170.

While it is true the doctrine of ademption does not apply to specific devises or legacies as a general rule—*Swails v. Swails*, 98 Ind. 511—yet even in case of a specific devise or bequest, if the very thing devised or bequeathed had been transferred to the devisee or legatee in the lifetime of the testator, so that there would be nothing left for the will to operate upon, an effectual ademption would have taken place.

Accepting the foregoing as the true criterion of a specific legacy, it becomes clear that the bequest of five hundred dollars in cash to each of the sons and daughters named, and

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the further direction that this was to be considered in full of their respective interests in the homestead farm, and that the devises and bequests previously made were not to affect any other interest or estate, did not constitute a specific bequest of any portion of the testator's estate, to be transferred in specie.

Neither did the legacies belong to that intermediate class which are sometimes denominated demonstrative, and which are peculiar in that they are not ordinarily liable to be adeemed or abated by an advancement made in a general way. "A demonstrative legacy is 'a bequest of a sum of money payable out of a particular fund or thing.' It is a pecuniary legacy, 'given generally, but with a demonstration of a particular fund as the source of its payment.' It is, therefore, equivalent to, or in the nature of, a devise or bequest of so much, or such a part of the fund or thing specified." *Glass v. Dunn*, 17 Ohio St. 413; 5 Am. & Eng. Ency. of Law, p. 541; 2 Redfield Wills, 140, 141.

While it is quite true the will plainly indicates that the sums bequeathed to the sons and daughters named were to be taken in full of their respective interests in the homestead farm, which was specifically devised to the two other sons named in the will, there is no direction that the bequests are to be paid out of any particular fund, or that the fund out of which payment is to be made is to be derived from the rents, issues or profits of the land, or that the legatees are to have any interest as such in the land itself. The implication is that the bequests were chargeable against the devisees of the land, or, at most, that they should be chargeable upon the farm. Moreover, since it appears by the agreed statement of facts that the sons to whom the homestead farm was devised furnished the money with which the legacies were paid, it is not apparent why this should not be held to satisfy the bequests, even though it should be conceded that they were payable out of the land. If thus payable, it must have been contemplated that the amount should constitute a charge

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upon the farm, to be removed by the devisees at some time by paying the several amounts to the legatees.

We know of no authority which would justify a holding that a general legacy, which is payable out of a particular fund or in a specified manner, may not be satisfied in case the legatee receives the amount thereof from the testator in his lifetime out of the very fund devoted to the payment of the bequest, provided it clearly appears that the amount was given and received with the intention that it should work an ademption of the legacy.

If we assume that the homestead farm was to be the source from which the fund was to be derived out of which the legacies were payable, the conclusion follows that the devisees of the farm were to take it subject to the burden of paying the legacies after the testator's death. Having furnished the money to the testator, during his lifetime, with which to pay off the bequests, and the money having been paid to the legatees and received by them for that purpose, the legacies are effectually satisfied from the very source contemplated by the will.

An ademption results where a parent, or other person standing *in loco parentis*, after having made a bequest, gives a portion to the child to whom the bequest is made, equal to, or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*. *Weston v. Johnson*, 48 Ind. 1. Within the rule thus stated, the legacies were adeemed. Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed, because the testator's title to the thing or fund has been divested by the gift and has become vested in the legatee during the lifetime of the testator. *Clayton v. Akin*, 38 Ga. 320 (95 Am. Dec. 393).

The fact that one of the legatees was a married woman at the time she received the money from her father and signed the receipt, is of no consequence. The receipt of the money

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from the source contemplated by the will satisfied the legacy by operation of law, and not by force of any contract. Money paid to a married woman, in ademption of a legacy, produces the same legal result as if she were unmarried. There was no error.

The judgment is affirmed, with costs.

Filed April 2, 1889.

118	152
119	541
118	152
167	209
167	340
167	341

No. 11,637.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAIL-
ROAD COMPANY v. KITLEY.

RAILROAD.—Obstruction of Highway.—A railroad company which leaves its cars standing in a public highway is guilty of an unlawful obstruction thereof, under sections 1964 and 2170, R. S. 1881, notwithstanding it may leave a portion of the center of the roadway open for the passage of vehicles.

SAME.—Car Standing in Highway.—Frightened Horse.—Personal Injury.—Complaint.—In an action against a railroad company for damages, the complaint is sufficient, as against a demurrer, if it alleges that the plaintiff was injured by reason of her horse becoming frightened at a car negligently left standing in a public highway along which she was lawfully driving, without alleging that there was anything peculiar or unusual about the car likely to frighten horses.

SAME.—Negligence of Employees.—Averment as to.—A general allegation in the complaint that a car was negligently placed and allowed to remain in the highway by the employees of the defendant, is sufficient to charge the latter with negligence, without specifying the particular employees or pointing out their duties with respect to the moving of cars.

SAME.—Evidence.—Erroneous Admission.—When Party Estopped to Complain.—Where the defendant, over the objection of the plaintiff, secures a ruling admitting testimony that horses had passed the obstruction in the highway without becoming frightened, it can not complain of the

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admission of testimony upon the same subject in rebuttal, even if such evidence is incompetent.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellant.

A. C. Ayres, E. A. Brown and L. M. Harvey, for appellee.

OLDS, J.—This is an action brought by the appellee against the appellant for damages resulting to the appellee by reason of her horse becoming frightened at a car negligently left standing upon the railroad track of appellant at a highway crossing, causing the horse to become unmanageable, running away and throwing appellee from her buggy and severely injuring her.

The errors assigned and discussed by counsel for appellant in their brief are the overruling of the demurrer to the complaint and the overruling of the motion of appellant for a new trial.

After some formal allegations the complaint avers that on the 16th day of April, 1882, the defendant (the appellant) was using and operating a line of railway between the city of Columbus, in the State of Ohio, and Indianapolis, in the State of Indiana, which line passed through the town of Cumberland, Marion county, Indiana; that for two days before said 16th day of April, 1882, the employees of said road carelessly and negligently placed a car, which was used by said company, the defendant, in carrying freight over the line of its said road track, in the public highway crossing said track, leading from the town of Cumberland to the home of the plaintiff, about five miles south of Cumberland, in such manner that the wheels under the east end of said car were standing on or near the west end of a plank roadway in about the center of said highway, which plank way had been provided as a crossing of said railroad track, and the east end of said car was nearly in the center of said public highway, partially obstructing the passage; that the employees of said

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defendant carelessly and negligently caused and allowed said car to so remain partially obstructing said highway, from the time it was so placed there until after the happening of the accident hereinafter set out; that another car used for the same purpose was standing over a cow-pit to the east side of said highway, and that on the 16th day of April, 1882, plaintiff was travelling with one Jennie Tishner, in a buggy drawn by a horse which she had been accustomed to drive, and which was a very gentle animal, along said public highway so leading from said town of Cumberland, which highway was the nearest and most direct route from said town to her home, and which crosses the defendant's road track, which passes through said town as above stated; that she attempted to cross said road track through the space left between said cars, which was the only place for her to cross said track, turning a little to the east so as to have room to pass, and she says she approached said crossing with due care, but just as the horse reached said track he became frightened at the car so wrongfully placed and left standing in said road to its right, and commenced backing and rearing, and, becoming unmanageable, threw this plaintiff from said buggy upon the ground, also throwing the other occupant of the buggy, who was a large and heavy woman, upon her; that she was a married woman, and in delicate condition, and was so hurt by the fall that she could not walk. Other allegations describe the nature and extent of the injury, and allege that said accident occurred without plaintiff's fault, or the fault of the young lady riding with her, contributing thereto.

The objections urged to the complaint by counsel for appellant are: First. That there is no allegation in the complaint as to why the horse became frightened at the car; that a car is not of itself a thing likely to frighten a horse, any more than a tree or a house, and that to make the complaint good it should allege that there was something peculiar and unusual about the car, likely to frighten a horse. This objection, if tenable at all, could not be reached by demur-

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rer. The complaint does allege that "the horse became frightened at the car," and this allegation is sufficient. There would be some force in the argument of counsel if addressed to a motion to make the complaint more specific, yet even as against such a motion we think the complaint would be good ; but the complaint is clearly good as against a demurrer on account of this objection. In the case of *Brookville, etc., T. P. Co. v. Pumphrey*, 59 Ind. 78, the complaint alleged that the appellee's horse became frightened at a hole in the turnpike ; that appellants had allowed the turnpike to get out of repair, and the floods had washed a hole near the center of the road, and appellants had negligently allowed it to so remain out of repair, and while appellee was riding on horseback upon the turnpike, her horse took fright at the hole and threw her, inflicting severe injuries. The allegations in the two complaints are quite similar, and the complaint in that case was held good. There is, in the language of counsel for appellants, nothing "Gorgon like" about a hole in the ground, even when it is a hole in a turnpike ; yet it was unlawfully there, and the lady's horse became frightened at such unlawful obstruction and threw her, and the court held the complaint good and the turnpike company liable. So, in this case, the car was negligently allowed to remain upon the track at the crossing of the highway ; it was an unlawful obstruction of the highway, and the appellee's horse became frightened at such unlawful obstruction, and became unmanageable and ran away and injured her, without any fault on her part. We do not hold that there is anything about a car that, if, while in lawful use by a railroad company, a horse would become frightened at it and run away and injure a person, the company would be liable, but in this case there was an unlawful use made of it. It was being used as an obstruction of the highway, and while occupying such unlawful position the horse became frightened at it. Had the company been using the car for a lawful purpose, it would have been removed from the highway two days before the injury, as ap-

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pears from the allegations of the complaint, and the horse of the appellee would not have been frightened by such unlawful obstruction, placed and allowed to remain in the highway by appellant. *Clinton v. Howard*, 42 Conn. 294.

It is further urged by counsel for appellant that the appellant company had the right to use all of the highway, except the plank crossing, for the purpose of standing cars upon their track; that the car was rightfully upon the crossing.

Such obstruction of a public highway is expressly prohibited by statute. See sections 1964 and 2170, R. S. 1881; *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160; *Young v. Detroit, etc., R. W. Co.*, 56 Mich. 430.

The further objection to the complaint is, that it does not aver that the appellant negligently placed or left the car upon the highway; that the complaint must specifically allege what employees placed or left the car upon the track, and that it was the duty of such employees to have removed the car; that, for aught that appears in the complaint, it might have been placed and left upon the highway by employees of the company having nothing to do with the moving of cars for the appellant; that it may have been placed there by clerks or office boys.

In view of the allegations of the complaint, the court will not indulge in such wild speculation. The complaint avers that "two days before the said 16th day of April, 1882, the employees of said road carelessly and negligently placed a car, which was used by said company, the defendant, in carrying freight over the line of its said road track, in the public highway crossing on said track, in such a manner that the wheels under the east end of said car were standing on or near the west end of a plank roadway in about the center of said highway;" and, after fully describing its situation, it avers that "the employees of said defendant carelessly and negligently caused and allowed said car to so remain, partially obstructing said highway, from the time it was so placed there until after the happening of the accident."

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The charge, both as to placing the car on the highway and allowing it to remain, is as to all the employees of the company; it is broad enough to, and does, include the employees whose duty it was to move cars and to remove cars from improper places, and whose duty it would have been to have placed it at some other point than upon a highway crossing, and to have removed it after it was placed there.

The charge is general, but if the appellant desired to have it specific it was its duty to have made a proper motion in the court below. The complaint is not objectionable to a demurrer, and the demurrer was properly overruled. *Mann v. Central Vermont R. R. Co.*, 55 Vt. 484.

There are numerous objections urged to charges given and refused by the court. Those most strongly urged are based upon the same theory upon which it has been urged that the complaint is insufficient. We do not deem it proper to extend this opinion by setting out the charges. There was no error committed by the court either in the giving or refusing of the charges pointed out by counsel for appellant.

There is another cause urged for a new trial, that is, admitting certain witnesses to testify that their horses became frightened at the same car while it remained an obstruction in the highway.

It is unnecessary to decide whether this evidence was proper or improper, as it was introduced in rebuttal of the evidence of a witness on behalf of appellant, who had testified that he had seen horses pass there and they were not frightened, particularly the horses of those witnesses who testified in rebuttal. Objection was made to the testimony of appellant's witness, which was overruled. Objection was not made to each question, but it was not necessary. Appellant offered such testimony, and there was an objection made by counsel for appellee, and appellant obtained a ruling in its favor. It can not be heard to complain because the appellee met its testimony by testimony of like character. A party must be consistent; he can not advocate a theory

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until he has obtained the admission of evidence in his own behalf upon such theory, and then renounce it, and gain the benefit of an erroneous ruling, which he was the first to ask the court to make. This is a doctrine well settled in this court. *Meranda v. Spurlin*, 100 Ind. 380; *Lowe v. Ryan*, 94 Ind. 450; *Nitche v. Earle*, 117 Ind. 270.

There is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Filed April 2, 1889.

No. 14,605.

THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY
v. FULLEN ET AL.

FREE GRAVEL ROAD.—*Expense of Constructing.*—*Limitation of Assessment.*—

It is only the legitimate expense of constructing a free gravel road that can be assessed against the land-owners. If the board of commissioners exceeds its authority, the county must either bear the loss or compel the commissioners to account.

SAME.—*Allowances.*—*Appeal.*—Land-owners are not bound to appeal as each allowance is made, but they have a right to wait until final judgment is entered and then appeal.

SAME.—*Appeal from Reassessment.*—*Questions Presented.*—By an appeal from the final order made by the board of commissioners in proceedings to reassess the property benefited by the construction of the road, all questions affecting the amount of the second assessment may be brought before the court.

SAME.—*Auditor not Entitled to Compensation.*—There is no law providing that the county auditor shall receive compensation for services rendered by him in proceedings under the act of 1877 for the construction of a free gravel road, and he can not be allowed compensation as a part of the expense of constructing the road.

118	158
118	120
121	108
123	408
118	158
126	363
118	158
130	519
118	158
132	29
133	95
118	158
137	362
137	388
118	158
147	508
118	158
148	473
118	158
168	536

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SAME.—Attorney's Fees.—The fees of attorneys employed by the board of commissioners can not be charged against the land-owners, in cases where the courts decide that they had just cause for resisting an assessment.

From the Montgomery Circuit Court.

B. Crane, A. B. Anderson and J. H. Burford, for appellant.

P. S. Kennedy, S. C. Kennedy, J. Wright and J. M. Seller, for appellees.

ELLIOTT, C. J.—This case is here for the second time. *Board, etc., v. Fullen*, 111 Ind. 410. The appellant's counsel now insist that the trial court erred in refusing to allow some of the items which the board of commissioners included in the second assessment made against the land-owners to pay the cost of constructing the free gravel road.

We do not doubt, as we said in our opinion when the case was here before, that the object of the various statutes providing for the construction of free gravel roads is to lay the expense of constructing them on the land-owners, and relieve the county from the burden. The debt created for this purpose is primarily the debt of the land-owners, and is chargeable upon a specific fund, and not upon the county. *Board, etc., v. Fahlor*, 114 Ind. 176. But, while this is true, it is also true that it is only the cost of constructing the road that can be assessed upon the land. If county commissioners transcend their authority they can not compel the land-owners to pay the additional expense thus occasioned. The county must bear it, or else compel the commissioners who violate their duty to account. It is, at all events, only the legitimate expense of constructing the road that can be assessed against the land-owners. The statute is the sole source and measure of the powers of the board, and if the commissioners exceed their powers they do not bind the land, nor the owners. If, therefore, the rejected items were not part of the legitimate expense, direct or incidental, of constructing the road, the

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land-owners can not be assessed to pay them, and the trial court did right in rejecting them.

We can not hold that the land-owners are concluded because they did not appeal as each allowance was entered. They were not bound to take up the case by piecemeal. *Western Union Tel. Co. v. Locke*, 107 Ind. 9. They had a right to wait until the final judgment was entered and then appeal. The appeal brought before the circuit court for review all intermediate orders and allowances. After the final order in the original assessment the appellees were out of court, and were not bound by the acts of the board until duly brought into court upon the second notice. *Gavin v. Board, etc.*, 104 Ind. 201; *Board, etc., v. Fullen, supra*; *Abbett v. Board, etc.*, 114 Ind. 61; *Board, etc., v. Gruver*, 115 Ind. 224. This notice brought them into court to litigate all matters connected with the claim of the board to make a reassessment, and they had a right to be heard upon all questions involved in the claim of the board to make a reassessment against their property. They had a right, therefore, by appeal from the final order, to bring before the court all questions affecting the amount of the reassessment. They are not concluded because they did not appeal as each allowance was made.

The proceedings were prosecuted under the act of 1877. *Robinson v. Rippey*, 111 Ind. 112; *Board, etc., v. Fullen, supra*. It was held, in *Wright v. Board, etc.*, 98 Ind. 88, that the act of 1879 took away from the auditor the right to compensation in gravel road cases, and that decision is in harmony with many other decisions of our court. But it is argued by the appellant's counsel that the act of 1883 dissipates the force of the decision in *Wright v. Board, etc., supra*, and that, under that act, the auditor is entitled to compensation. The act of 1883 does prescribe the duties of the auditor, but it does not provide that he shall receive compensation. Acts of 1883, p. 168, section 2. It was not in the power of the commissioners to give compensation, as none

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is provided by law. An officer who demands compensation must produce a law providing for it. *Board, etc., v. Gresham*, 101 Ind. 53; *Noble v. Board, etc.*, 101 Ind. 127; *Taylor v. Board, etc.*, 110 Ind. 462; *Ex Parte Harrison*, 112 Ind. 329. There was, therefore, no error in rejecting the allowance made to the county auditor. It certainly was not a legitimate part of the expense of constructing the road.

The trial court did right in allowing the surveyor or engineer \$2.50 per day as his compensation. The evidence warrants this estimate of the value of his services.

If the allowance to the engineer was, as is now claimed, made before the original assessment, then the commissioners had no authority to include it in the second assessment; if it was not, then the appellees had a right to oppose it.

Where land-owners unsuccessfully resist the payment of assessments, there would seem to be some justice in the claim that the fees of the attorneys employed by the county should be paid by the defeated parties; but this is, in any event, a matter for the Legislature, and not for the courts, since the courts can not legislate, and to create such a right legislation is required. In this instance, however, the land-owners were successful, and it would be unjust to compel them to pay the fees of the attorneys of their adversaries. Whether reasonable attorney's fees for preparing papers, giving advice and the like, can be recovered as part of the expense of constructing the road, or whether such services must be performed by the regular attorney of the county, is a question not so presented here as to require a decision, and it is, of course, neither considered nor decided. Section 5102, R. S. 1881, can not be construed as meaning that the fees of attorneys employed by the board of commissioners shall be paid by land-owners, in cases where the courts decide that they had just cause for resisting the original assessment or the reassessment.

We can not say that there is no evidence sustaining the

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allowance made to the contractor Clements by the board of commissioners and the circuit court, and we therefore decline to interfere with the finding on that question.

Judgment affirmed.

Filed March 16, 1889; petition to modify opinion overruled March 30, 1889.

 No. 14,647.

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118	162
150	390

LANDLORD AND TENANT.—*Contract.*—*Notice to Quit.*—*Evidence.*—While no notice to quit is necessary where the time when the tenancy expires is fixed by written contract, yet if a notice be given, although not in the manner provided by the statute, it is admissible in evidence, in an action for possession, to show that the landlord insisted on his right to possession at the time fixed.

EVIDENCE.—*Motion to Strike Out.*—*Practice.*—A motion to strike out the testimony of a witness upon a given subject, as a whole, should be overruled if a part of such testimony is competent.

From the Henry Circuit Court.

D. W. Chambers, C. S. Hernly and S. H. Brown, for appellant.

J. B. Brown, for appellee.

OLDS, J.—This is an action between landlord and tenant for the possession of real estate. The appellee leased to the appellant the real estate in question for the period of one year, from the 10th day of August, 1887, to the 10th day of August, 1888, by written contract. The complaint is in three paragraphs. The first paragraph avers the making of the lease; that the lease had expired and the appellant was un-

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lawfully holding over. A copy of the lease is filed with the complaint. The second alleges a lease of the real estate on the 10th day of August, 1887, by the year, and that, on the 9th of May, 1888, the appellee served notice on the appellant to surrender the possession of said real estate to her at the expiration of the current year, and alleges that appellant unlawfully held over after the 10th day of August, 1888, up to and at the time of the commencement of this action. The third alleges that appellee is the owner in fee of the real estate, and that defendant has unlawfully, wrongfully and without right detained possession of the same since the 10th day of August, 1888. Prayer for possession and for damages for the unlawful detention.

The questions discussed by counsel arise on the motion for a new trial. The first alleged error complained of is the admission of a notice in evidence. It is objected to on the ground that the evidence showed the notice to have been read to the appellant, instead of having been delivered to him or served in the manner pointed out by the statute. Section 5214, R. S. 1881.

There was a written contract in this case fixing the term and time of the expiration of the lease, and no notice to quit was necessary. Section 5213, R. S. 1881. The admission of a notice in evidence which was shown to have been read to the tenant was proper. It was as competent as any conversation or verbal notice to quit the premises would have been. It is not necessary to determine whether the service was such as under the statute would terminate a tenancy from year to year, for the reason that the time of the lease was fixed by the written contract. It was proper to show what had taken place between the parties after the execution of the lease, and that the appellee was insisting on her right to the possession at the termination of the written lease, and that in addition to relying on her written contract she also notified him to surrender the premises at the expiration of the lease.

It is also insisted that the court erred in admitting the evi-

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dence of a witness on the question of damages in testifying as to the value of the use of the farm, and in refusing to strike out such evidence. The witness had testified as to the value of the farm, and certain portions of it, during the time the appellee claimed it had been unlawfully detained, and in the course of such examination was asked whether or not he took into consideration the right to use the farm for sowing wheat amid the corn in the fall of 1888, and he answered that he did; thereupon the appellant moved to strike out all of the evidence of the witness on the question of damages, for the reason that he had included the use of the corn-ground for the purpose of sowing wheat, and the court overruled the motion to strike out the testimony of the witness. There was no error in this ruling. The witness had testified to the value of the use of specific portions of the farm other than the corn-ground, and then, in answer to a general question, he testified as to the value of the use of the whole farm. In answer to another question, he stated that he included in his general estimate the use of the corn-ground to sow wheat in the fall of 1888. This would not render all of his evidence on the subject of values incompetent, and the motion was to strike it all out; but, indeed, if the motion had only applied to the answer as to the general question calling for the value of the use of the whole farm, it would not have been error to have overruled it. It was a proper subject for cross-examination, and of ascertaining how the witness apportioned the amount, and, in making his general estimate, what value he put upon the corn-ground.

It is claimed the finding is not supported by the evidence. We think otherwise. It was a tenancy created by a written lease, and the term fixed by the lease had expired, and the appellee was entitled to the possession of the real estate. There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed March 30, 1889.

Bundy v. McClarnon.

No. 13,580.

BUNDY v. McCLARNON.

118	165
118	600
118	165
147	306
118	165
168	30

SPECIAL FINDING.—Conclusions of Law.—Failure to Except to.—Motion for New Trial.—An assignment, as one of the grounds for a new trial, that the decision of the court is contrary to law, does not perform the office of an exception to the conclusions of law stated by the court on a special finding of facts, nor does such an assignment remedy the failure to except to the conclusions of law.

From the Hancock Circuit Court.

L. H. Reynolds, for appellant.

MITCHELL, J.—Suit by Bundy against McClarnon for partition of real estate of which the former alleged he was owner as tenant in common with the latter.

McClarnon set up by way of cross-complaint, among other things, that he was the owner in fee simple and in possession of the entire tract of land described in the complaint, and that the assertion by Bundy of title to any part thereof was wrongful and a cloud upon the cross-complainant's title, which he prayed might be quieted.

Upon what purports to be a special finding of facts by the court there were conclusions of law stated, followed by a judgment that the plaintiff take nothing by his suit.

The appeal is presented and argued as if there had been a proper finding of facts by the court, and as though there had been an exception to the conclusions of law thereon stated.

Instead of finding the facts, the court has set out some items of evidence which might tend to prove some of the facts in issue, and has stated its conclusions thereon. There is, however, in no proper sense, any finding of facts, nor is there any exception to the conclusions of law thereon stated.

There is a forcible and well sustained discussion of the law upon the facts, as, possibly, they might have been found, but,

Bundy v. McClarnon.

in the absence of what can be accepted as a finding of the facts, and of exceptions to the conclusions of law thereon stated, we can not consider the questions discussed.

An assignment, as one of the grounds for a new trial, that the decision of the court is contrary to law, does not perform the office of an exception to the conclusions of law stated by the court on a special finding of facts, nor does such an assignment remedy the failure to except to the conclusions of law.

The facts in this case are analogous to those involved in *Wright v. Kleyla*, 104 Ind. 223, and the judgment of the court below was controlled by the decision in the case cited. Under the ruling in the case cited, there was no error in the ultimate conclusion reached by the court in the present case.

It is true that the quitclaim deed of a married woman, by which she attempts to convey her inchoate right in her husband's real estate, the husband not joining in the deed, is void both in law and in equity. *Kinnaman v. Pyle*, 44 Ind. 275; *Mattox v. Hightshue*, 39 Ind. 95; *Cook v. Walling*, 117 Ind. 9. It is also true that the wife had no right of entry at the time her husband's land was sold as against the purchaser until the death of her husband, and that the statute of limitations does not begin to run against a person out of possession until there is a right of entry. *Devy v. Shaffer*, 55 N. Y. 451; *Gernet v. Lynn*, 31 Pa. St. 94; *Pinckney v. Burrage*, 31 N. J. L. 21; 3 Washb. Real Prop., p. 138; Tiedeman Real Prop., section 715.

However these principles might affect the conclusion reached by the court below, in the confused and uncertain condition in which we find the record, and because, in our opinion, they are not fairly and properly presented, we decline to enter upon an examination of the questions discussed.

The judgment is therefore affirmed, with costs.

Filed March 29, 1889.

The State v. Dorsey.

No. 14,239.

THE STATE v. DORSEY.

CRIMINAL LAW.—Involuntary Manslaughter.—Railroad Engineer.—Negligently Running Engine into Passenger Car.—Where a railroad engineer, while engaged in operating the engine in his charge, carelessly and negligently runs the same into a passenger car standing upon the railroad track, thereby causing the destruction of the car and the death of a passenger therein, he is guilty of the offence of involuntary manslaughter, as defined by section 1908, R. S. 1881.

From the Porter Circuit Court.

L. T. Michener, Attorney-General, *E. D. Crumpacker*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

J. B. Kenner and *J. I. Dille*, for appellee.

BERKSHIRE, J.—The indictment is made up of two counts; the second count was quashed in the court below, and from that decision the State appeals.

The appellee was a railroad engineer, and was running and operating a locomotive engine over the Chicago and Atlantic Railroad and through Porter county, and while thus engaged he carelessly and negligently ran his locomotive engine into a passenger car standing upon said railroad, thereby causing the destruction of said car and the death of one William Perry, who was a passenger thereon.

The indictment contains all of the formal allegations necessary to a good indictment, and all necessary substantive allegations, if our statute defining involuntary manslaughter is broad enough to cover an involuntary destruction of life by the commission of a careless and negligent act, not of itself criminal. The statute reads as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter." Section 1908, R. S. 1881.

118	167
162	217
4162	218

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At common law there is no question but that the indictment would be good. The authorities in that direction are abundant, some of which we will cite: 1 Bishop Crim. Law, section 314 (7th ed.); Wharton Crim. Law, section 130 *et seq.*; Wharton Crim. Law, section 329 *et seq.*; *State v. O'Brien*, 32 N. J. L. 169; *Commonwealth v. Kuhn*, 1 Pitts. 13; *Commonwealth v. Hunt*, 4 Met. 111; *Mercer v. Corbin*, 117 Ind. 450; *Commonwealth v. Hartwell*, 128 Mass. 415; Moore Crim. Law, section 863; Gillett Crim. Law, section 502.

The common law definition of manslaughter, as given by Blackstone, is as follows: "The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act." Blackst. Comm., Book 4, p. 191. The statutory definition of involuntary manslaughter is, word for word, the same as Blackstone's.

There is nothing to be found in the section defining this crime, or elsewhere in the statute, to indicate that the words *unlawful act* are to have a different interpretation than that given to them at common law. And the Legislature having borrowed the common law definition of involuntary manslaughter, it is fair to presume, there being nothing to indicate to the contrary, that it was the legislative intention that the statute should be construed in the light of the common law. In addition, we have the following statutory provision in regard to the construction of statutes: "Words and phrases shall be taken in their plain, or ordinary and usual sense. But technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Section 240, R. S. 1881. The words *unlawful act*, as used in the section of the statute relating to involuntary manslaughter, are not technical words, therefore they are to have their plain or usual meaning. Webster defines the word *unlawful* as follows: "Not lawful; contrary to law; illegal; not permitted by law;" and the word

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act as follows: "That which is done or doing; the exercise of power, or the effect, of which power exerted is the cause; performance; deed." The word *unlawful*, as defined by Bouvier, in his law dictionary, is: "That which is contrary to law." Another definition is: "*Unlawful* implies that an act is done or not done as the law allows or requires." Anderson Law Dict. "'Lawful,' 'unlawful' and 'illegal' refer to that which in its substance is sanctioned or prohibited by the law." Anderson Law. Dict. "The reader should bear in mind, that 'unlawful' signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution." 2 Bishop Crim. Law, section 178. "A lawful act done in an unlawful or negligent manner, is in law an unlawful act." *Commonwealth v. Hunt, supra*. "Involuntary manslaughter is where a man doing an unlawful act, not amounting to felony, by accident kills another; or where one does a lawful act in an unlawful manner." *Commonwealth v. Kuhn, supra*; see Moore Crim. Law, section 863; see *Regina v. Skeets*, 4 F. & F. 931.

It is claimed that the Legislature has given a construction to the statute defining involuntary manslaughter by the enactment of sections 2172 to 2178, inclusive, R. S. 1881. We do not regard these sections as shedding light as to the construction to be given to the statute in question. These sections relate exclusively to the running and operating of locomotive engines and trains of cars over railroads, and were enacted with reference to certain acts and omissions which were theretofore not criminal. We do not mean to be understood as holding that every careless or negligent act, whereby death ensues, constitutes malice; far from it. To constitute manslaughter the act causing death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime.

The unlawful act charged in the indictment shows such wantonness and recklessness as to constitute manslaughter,

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if not murder. We are of the opinion that the second count in the indictment is good, and that the motion to quash should have been overruled.

The judgment is reversed, with the costs of this appeal, and the court below directed to overrule the motion to quash the second count of the indictment.

Filed March 29, 1889.

118	170
132	72
132	124
132	229

118	170
136	677

118	170
154	301
154	570

118	170
157	335

118	170
158	484

No. 13,615.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. REYNOLDS ET AL.

CONTRACT.—*Incomplete Writing.*—*Parol Contract.*—*Pleading.*—Where a letter neither contains nor purports to contain the entire contract between the parties, but, on the contrary, points to extrinsic facts, the contract is not a written, but a parol one, and it is proper to declare on it as such.

SAME.—*Attorney.*—*Compensation for Services.*—Where a railroad company contracts to pay an attorney reasonable fees "for assisting in trials in cases against the company," the right of the attorney to compensation is not limited to services rendered in "trials," in the narrowest technical meaning of the word, but he is entitled to pay for necessary services rendered in actions.

SAME.—*Construction.*—*Acts of Parties.*—Courts will follow the construction which the parties themselves, by their acts, have put upon their own contracts.

From the Carroll Circuit Court.

G. W. Easley and G. R. Eldridge, for appellant.

W. E. Uhl, A. W. Reynolds and E. B. Sellers, for appellees.

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ELLIOTT, C. J.—The basis of the contract under which the appellees rendered professional services for the appellant is the following letter :

“Gentlemen—Enclosed please find passes No. 253, A. W. Reynolds, and 254, E. B. Sellers, which are in full compensation for services that your firm may be called upon to render in White county during 1884, except for assisting in trials of cases against the company other than stock cases ; for such services, if rendered, you are to receive reasonable attorney’s fees, in addition to enclosed passes.”

During the years 1884 and 1885 the appellees rendered services in fourteen actions brought against the appellant for killing and injuring stock. During the same period they rendered services in twenty-eight actions of a different kind. In five of these actions there were trials of issues of fact ; in the remaining twenty-three cases demurrers were filed to the complaint, and the issues of law thus formed were determined by the court adversely to the appellant, and answers were subsequently filed, but the issues of fact thus formed were never tried. The court denied compensation in the fourteen “stock cases,” and awarded it for the services rendered in the twenty-eight cases.

It is contended by appellant’s counsel that as the complaint counts upon a verbal contract the appellees must fail, because the facts stated in the special finding show the contract to be a written one. In support of this position it is asserted that the complaint must proceed upon a definite theory, and that the recovery must be upon that theory. Many cases from our own and other reports are cited. Among them are the cases of *Mescall v. Tully*, 91 Ind. 96, *Lockwood v. Quackenbush*, 83 N. Y. 607, *Harris v. Hannibal, etc., R. R. Co.*, 37 Mo. 307, *Batterson v. Chicago, etc., R. W. Co.*, 8 Am. & Eng. R. R. Cases, 123, and *Waldhier v. Hannibal, etc., R. R. Co.*, 71 Mo. 514.

We have no doubt that counsel state the rule correctly, but the question is, do they give it a just application? That they

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do err in applying the rule seems clear to us. The letter does not, by its terms, constitute a complete contract, nor does it profess to do so. If it had stated a complete contract, it could not be varied or controlled by parol evidence. *Phillbrook v. Enswiler*, 92 Ind. 590; *Diven v. Johnson*, 117 Ind. 512. But it is not complete, and is on its face merely unilateral. *Tomlinson v. Briles*, 101 Ind. 538; *Higham v. Harris*, 108 Ind. 246. It does not specify the services which the appellees are to perform, nor does it designate the consideration to be yielded for the services that may be performed. It does provide that the passes given the appellees shall be their compensation for services in the class of cases denominated "stock cases," but it does not state what other services shall be rendered, and instead of providing a measure of compensation for other services, it provides that the appellees shall receive "reasonable attorney's fees." Two important elements are left open to parol agreement: the services to be performed, and the consideration to be yielded. It clearly implies that what shall be done in other than "stock cases," and what consideration shall be yielded, are to be ascertained by resorting to parol evidence. It is difficult to conceive of a case where the writing more clearly discloses its incompleteness and points to extrinsic facts. As the contract is not all in writing, it is a parol contract. This doctrine is firmly established. *Board, etc., v. Shipley*, 77 Ind. 553; *Pulse v. Miller*, 81 Ind. 190; *Stagg v. Compton*, 81 Ind. 171; *Board, etc., v. Miller*, 87 Ind. 257; *High v. Board, etc.*, 92 Ind. 580; *Gordon v. Gordon*, 96 Ind. 134; *Tomlinson v. Briles, supra*. The letter was a competent instrument of evidence, but it neither contains nor purports to contain the entire contract between the parties. The rule that where the contract is incomplete, parol evidence is admissible, was carried very far, possibly too far, in *Stagg v. Compton, supra*, for in that case the letter of the one party was answered in writing by the other, and yet it was held that the contract was not a written one. It may, perhaps, be true that the author-

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ities there cited do not fully sustain that decision ; but however this may be, they do sustain the decision which we make here.

The contention of appellant's counsel that because there were no trials of issues of fact in twenty-three of the cases the appellees are not entitled to compensation, is utterly destitute of merit. The steps taken by the appellees were essential to the formation of issues, and were, therefore, necessarily contemplated by the contract. It is quite clear that the parties did not mean to use the word "trials" in its narrowest technical signification ; but they meant that necessary services rendered in actions should be paid for by the appellant. It certainly was not intended that no compensation should be paid. But the submission of the cases on demurrer involved the trial of issues of law, and, therefore, there were "trials," even if the rigid construction insisted upon by counsel be conceded to be correct. Coke's Littleton, 124*b*. We do not, however, "stick in the bark" by a strict adherence to words, for we look to the whole contract as construed by the acts of the parties under it, and this gives us a substantial foundation, as it is a settled and salutary principle that courts will follow the construction that the parties themselves, by their acts, have put upon their own contracts. *Vinton v. Baldwin*, 95 Ind. 433 ; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347 ; *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300 ; *Reissner v. Oxley*, 80 Ind. 580 ; *Johnson v. Gibson*, 78 Ind. 282 ; *Chicago v. Sheldon*, 9 Wall. 50.

Judgment affirmed, with five per cent. damages and costs.

Filed March 29, 1889.

The Chicago and Eastern Illinois Railroad Company v. Katzenbach.

No. 13,556.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COM-
PANY v. KATZENBACH.

RAILROAD.—*Common Carrier.*—*Negligence.*—*Contract.*—*Consideration.*—The injury of property *in transitu* through the negligence of the carrier, is a sufficient consideration for an agreement on the part of the latter to pay the owner of the property a certain sum in settlement of damages.

SAME.—*Adjustment of Damages.*—*Right to Keep Injured Property.*—A railroad company has the right, in adjusting damages for injury to property caused by its negligence, to contract to keep the injured property and pay the owner its value.

SAME.—*Bill of Lading.*—*Limitation of Liability.*—*Waiver.*—A stipulation in a bill of lading limiting the liability of the carrier to a certain sum, is waived where the latter, in adjusting the damages resulting from its negligence, agrees to take the injured property and pay the shipper a larger sum than that limited.

From the Vigo Circuit Court.

W. Armstrong, L. D. Thomas and W. H. Lyford, for appellant.

C. F. McNutt, S. C. Davis and S. B. Davis, for appellee.

OLDS, J.—This is an action for the value of a mare, owned by the appellee and shipped by one C. L. Campbell over the appellant's railroad from the city of Terre Haute, Indiana, to the city of Chicago, Illinois, and injured and rendered worthless while in transit by a wreck on the railroad.

The complaint is in four paragraphs. The first alleges that in May, 1881, Campbell delivered to appellant one car-load of horses, consisting of seven head of horses, and received from appellant a stock contract, by which contract appellant agreed to deliver said car-load of horses to said Campbell at Chicago, Illinois, for \$20, said Campbell being consignor and consignee. That one of said horses—a mare—belonged to the plaintiff, that Campbell acted as agent of the plaintiff in

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the shipment; that said mare was of the value of \$1,000; that appellant failed to deliver said mare, but crippled her in transit, making her wholly worthless, whereby plaintiff sustained damage to the amount of \$1,000, and Campbell is made a party defendant to answer as to his interest.

The second paragraph alleges that Campbell, as plaintiff's agent, shipped, in his own name, plaintiff's mare from Terre Haute to Chicago, over the appellant's railroad; that appellant made a written agreement with Campbell, in consideration of \$20, to deliver said mare and six other horses to said Campbell, at Chicago; that said contract is lost; that said mare was injured and rendered wholly worthless while in transit, and was never delivered to said Campbell, or any one else; that said mare was of the value of \$1,000; that on learning of said injuries, the plaintiff and Campbell at once notified said appellant that said mare was the property of the plaintiff, and plaintiff demanded that said appellant pay said damages, whereupon said appellant agreed to and did settle with said plaintiff for the mare, said Campbell releasing said appellant from all claims in so far as he was concerned; and then and there, in June, 1881, said appellant agreed with said plaintiff to keep said mare as its own, and pay plaintiff, in settlement therefor, \$500, which contract was accepted by said plaintiff; and in pursuance therewith said plaintiff released all claims for damages and of title to said mare; that said appellant has kept said mare, but wholly failed to pay to plaintiff said sum so agreed upon, or any part thereof, though often requested so to do.

The third is a common count for one mare sold and delivered in June, 1881.

The fourth paragraph of complaint alleges, that on May 18th, 1881, Campbell, as plaintiff's agent, shipped in his own name over appellant's road one certain mare belonging to plaintiff, and appellant accepted said mare, together with other horses belonging to Campbell, and gave to Campbell a written agreement (or bill of lading), wherein said appel-

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lant agreed, for a valuable consideration, to transport said mare (and other horses) without injury to the city of Chicago ; that said agreement is lost ; that said car was wrecked, and said mare ruined in transit, so as to be worthless ; that said mare was a blooded mare, and very valuable, and worth \$1,000 ; that said injuries were caused by said appellant running the train and car, in which said mare was being carried, in a careless and negligent manner, and by use of defective cars and rolling-stock and machinery, and the negligent employment of improper servants ; and that said injuries were caused without any fault on the part of plaintiff, whereby plaintiff was damaged in the sum of \$1,000.

Appellant filed separate demurrers to each paragraph of complaint, which were overruled and exceptions reserved by appellant. Appellant then answered in five paragraphs :

The first is a general denial. The second, payment. The third avers that after the making of said contract, and after committing said supposed grievances, and before the bringing of this action, appellant delivered to appellee, and appellee accepted from said appellant, the railroad company, the sum of \$1,250 in full satisfaction of all damages, liabilities and debts mentioned in said complaint. The fourth answers the second and third paragraphs of complaint, and alleges that the promises and agreements set up in said paragraphs were without any consideration. The fifth answers the first, second and fourth paragraphs of complaint and admits the injury to the mare, together with other horses belonging to Campbell, but avers that said mare was fraudulently and surreptitiously put into appellant's car and train by plaintiff, or his agent, or Campbell, without the knowledge or consent of appellant, without any bill of lading or stock contract, for the fraudulent purpose of having said mare transported free, and said mare was transported without any consideration, and was injured through the fault of the plaintiff in thus fraudulently putting said mare in said car. Appellee replied to the answers by general denial. Trial by jury. Verdict and

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judgment for appellee for \$630. Motion for a new trial by appellant. Motion overruled, and exceptions by appellant.

It is contended that the evidence does not support the verdict; that the evidence does not show that Robert Forsyth made a contract on the part of appellant to pay \$500 for the mare, and that if he did make such a contract, he had no authority to make it, and it would not be binding upon the appellant company, and that it was without any consideration.

It is sufficient to say there is evidence tending to prove, and from which the jury may have found, that Col. Robert Forsyth was the appellant's general freight agent, and that, immediately after the wreck, Col. Forsyth came to the place where the wreck occurred, by the authority of and acting for the appellant, for the purpose of looking after the injured property and adjusting claims for damages; that the appellant's agents knew the number of horses that were shipped in the car; that Col. Forsyth took charge of the injured horses, ordered them cared for and treated, adjusted the claim for damages to the other horses, and agreed upon the terms of settlement for this mare of the appellee; that he agreed, on the part of appellant, to take the mare and to pay the appellee \$500 in settlement of appellee's claim; that the injury occurred by reason of defects in the cars, and negligence on the part of the appellant in using and running defective cars; and that Col. Forsyth acted within his authority in adjusting and agreeing upon the terms of settlement with appellee.

The theory that there was no consideration for the agreement certainly is not tenable. The evidence tended to prove the mare to be a very valuable animal, and that she was injured by the negligence of the appellant, which would make the appellant liable for the damages occurring by reason of appellant's negligence. That of itself would be a sufficient consideration, but in addition to that, appellee gave up his

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right and ownership to the mare to appellant, and appellant accepted and became the owner of her. The contract was one within the power of the company to make. A railroad company has the right, in adjusting injury to property caused by its negligence, to contract to keep the injured property and pay the owner its value in settlement of the damages.

It is contended that, by the terms of the bill of lading, the damages recoverable by the appellee were limited to \$150. If the contract did so limit the damages to be recovered in case of injury, that stipulation in the contract was one which might be waived by the parties to it, and would be waived by a settlement of the damages resulting by the negligence of the appellant company by the company agreeing to take, and taking, the injured mare and agreeing to pay a larger sum.

It is contended that the court erred in the admission of evidence of the value of the mare at Terre Haute at the time she was placed on board the cars.

The bill of lading in evidence contains an express provision that in case of injury the value of the stock at the place and date of shipment shall govern the settlement. And, taking into consideration the quality of the animal, her value for speed and breeding, and the accessibility to that market, the evidence might be proper in showing the value of the mare at the time and place of the injury, and, for aught that appears in the record, such evidence was admissible under the issues in the case.

The next error assigned is upon the giving and refusing of instructions. We do not deem it proper to extend this opinion by setting out the instructions given and refused which are complained of. We have carefully examined the instructions, and the objections urged to each. We do not think there was any error in the giving or refusing of the instructions, for which the case ought to be reversed.

These are the only questions discussed by counsel, and

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there is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Filed March 29, 1889.

118	179
125	582
118	179
147	90
118	179
149	547
149	549
118	179
153	51

No. 14,810.

LAMB, RECEIVER, v. MORRIS.

BANK.—*Right to Apply Deposit to Payment of Note.*—*Suretyship.*—A bank has no right, without the depositor's consent, to apply money due him as a depositor to the payment of a note held by the bank, upon which he is liable as surety.

SAME.—*Contract.*—*Equitable Appropriation of Deposit.*—*Promissory Note.*—*Receiver.*—Where a bank, holding an overdue note upon which a depositor is surety, agrees with the latter that an amount of his account equal to the note shall be considered as applied in payment thereof at any time, and that the note shall be held by the bank and collected for the surety's benefit, the latter at no time to draw his account below the sum due on the note, upon the failure of the bank the depositor is entitled to any sum that the receiver may collect from the principal in the note, the agreement between the bank and the depositor being an equitable satisfaction of the note as to the latter, and making it his property.

From the Marion Superior Court.

W. H. H. Miller and *J. B. Elam*, for appellant.

J. C. Green, W. W. Herod, W. P. Herod, F. Winter, A. Baker and *E. Daniels*, for appellee.

MITCHELL, J.—The questions for decision in the present case arise out of the following facts: On the 26th day of May, 1881, Alfred and John C. S. Harrison were partners, engaged in a general banking business in the city of Indian-

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apolis. They loaned to Joshua G. Adams fifteen hundred dollars, for which he executed his note, due in ninety days, with Nathaniel N. Morris as surety. The note was not paid at maturity, and the evidence shows that payment was requested of Morris, who thereupon instructed the proprietors of the bank to charge the amount due on the note to his account, he having at the time an amount of money on deposit in the bank in excess of the sum due on the note. For prudential reasons, suggested by the bank, it was agreed that for the time being the note should not be charged up to Morris' account, but that the bank should consider an amount of the account equal to the sum due on the note as subject to be applied in payment thereof at any time, and that the note should remain and be held thenceforth by the bank, and be collected from Adams for Morris' benefit. The account was at no time to be drawn down to an amount less than that due on the note. Morris actually had to his credit from that time forward a balance in excess of the sum due on the note, and this balance was used by the bank in its general business, the same as was the money left by other depositors. The matter remained in this condition until July, 1884, when the bank failed, and its assets were taken in charge by the Marion Superior Court and placed in the hands of a receiver, at which time Morris had to his credit upwards of \$4,000. The Adams note came to the hands of the receiver as part of the assets of the bank, and the latter collected from the principal maker about fourteen hundred dollars, which amount Morris claims should be paid over to him, he, as he alleges, having paid the note to the bank as surety for Adams.

The foregoing, among other facts, were set up in an intervening petition by Morris, who asked that the receiver be ordered to pay over the money so collected from Adams to him. The judgment at special term, which was adverse to the petitioner, was reversed on appeal to the general term, and the receiver now prosecutes this appeal.

Whether or not the petitioner may require the receiver to

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pay over the money collected by the latter from Adams, depends entirely upon the force and effect of the agreement between him and the bank.

On the receiver's behalf it is contended that the rights of the parties were in nowise affected by the agreement; that without the agreement the bank had the right to appropriate a sufficient amount of Morris' deposit to the payment of the note after it became due, and that the agreement therefore conferred no right which the bank did not have before it was made. This position is untenable. It is a peculiarity of a deposit of money in bank that the moment the money is deposited it becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor. *Bank of Republic v. Millard*, 10 Wall. 152; *Carr v. National Security Bank*, 107 Mass. 45; *Commercial Nat'l Bank v. Henninger*, 105 Pa. St. 496; *Morse Banks and Banking* (3d ed.), section 289.

The general rule in keeping the account of a depositor is, that as money is paid in and drawn out a balance may be considered as struck at the date of each payment or entry on either side of the account, and it is the right of the bank, in case the depositor becomes indebted to it, by note or otherwise, and the deposit is not specially applicable to a particular purpose, or there is no express agreement to the contrary, to apply a sufficient amount thereof to the payment of any debt due and payable from the depositor to the bank. *Second Nat'l Bank, etc., v. Hill*, 76 Ind. 223; *National Mahaiwe Bank v. Peck*, 127 Mass. 298; *Commercial Nat'l Bank v. Henninger, supra*. This results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exists mutual demands. It is familiar law, however, that mutuality is essential to the validity of a set-off, and that, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner, made on his

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separate account, in order to apply it on a debt due from the firm, nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. *Watts v. Christie*, 11 Beav. 546; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Sefton v. Hargett*, 113 Ind. 592; Morse Banks and Banking, section 326.

It follows that, in the absence of a contract giving it the right to do so, the bank could not have applied money due the petitioner, as a depositor, to the payment of the note upon which he was surety, any more than it could have successfully pleaded the note as a set-off, in case the petitioner had brought suit to recover the balance due him on deposit.

Did the agreement change the previously existing relations between the parties in respect to the deposit account, and confer upon the bank any new rights or impose upon it any new duties in respect to the deposit? That it did seems clear beyond any question. In the absence of a special agreement, it is the right of a depositor, so long as the balance of his account exceeds the amount of any debts due and payable by him to the bank, to draw his check against the amount, and the bank is bound to honor his check, even though it may hold notes upon which the depositor is surety, unless circumstances of an extraordinary character exist. Hence, as we have seen, the petitioner had the right, in the absence of any agreement, to check out his entire balance. *People's Bank v. Legrand*, 103 Pa. St. 309. A bank deposit is subject, however, to any arrangement which the depositor and the bank may make concerning it, so long as the rights of third parties are not injuriously affected. *Howard v. Roeben*, 33 Cal. 399; *Chiles v. Garrison*, 32 Mo. 475; *Nat'l Bank, etc., v. Smith*, 66 N. Y. 271; *McEwen v. Davis*, 39 Ind. 109; Morse Banks and Banking, section 188.

A case in all respects parallel in principle to the present, arose out of the following facts: A depositor, having a bal-

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ance to his credit, requested his bank to pay a debt for him, agreeing that the balance should be applied in repayment. The bank paid the debt, and the depositor gave his note for the amount to the bank. Before the balance was actually applied and the account adjusted, the bank failed, holding the depositor's note, which, with the other assets of the bank, was taken possession of by a receiver. In an action by the receiver to collect the note, it was held that the agreement effected an equitable appropriation of the balance of the deposit account to the payment of the note. *Chase v. Petroleum Bank*, 66 Pa. St. 169.

In *Coats v. Donnell*, 94 N. Y. 168, it appeared that the cashier of a bank in Kansas City orally agreed with a banking house in the city of New York, that if the latter would accept drafts amounting to \$35,000, which the Kansas City bank had drawn upon it, the Kansas City bank would keep on deposit with the New York house an amount equal to the drafts drawn, and that the drawees should have a lien on the fund, with the right to appropriate so much of it as remained unpaid on the acceptances. Shortly after the arrangement was consummated the Kansas City bank failed, and made an assignment for the benefit of its creditors. The assignee brought suit to recover the amount of the deposit from the banking house in New York. It was held that the agreement authorized the bank to appropriate the deposit to the payment of the acceptances.

It is an uncontroverted fact in the present case, that the petitioner directed the bank to charge the amount of the note and interest to his account, and although it was arranged at the suggestion of the bank that the actual entry should not be made at the time, it was agreed that it might be made at any subsequent time, and that the bank should retain the note, and collect it for the depositor's benefit. This amounted to an equitable satisfaction of the note so far as respects the petitioner, and made it his property. The agreement was upon a sufficient consideration, and after it was made the de-

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positor had at no time the right to draw his account down without leaving an amount equal to the sum due on the note. A court of equity proceeds upon the principle that all agreements are considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist upon their performance. Snell Eq. 45; Pom. Eq. Jur., sections 364, 365.

The depositor having fully performed his part of the agreement, equity will regard that as done which ought to have been done. Receivers and assignees take the property which comes into their possession as such, subject to all legal and equitable claims of others. *Cook v. Tullis*, 18 Wall. 332; *Stewart v. Platt*, 101 U. S. 731; *Smith v. Felton*, 43 N. Y. 419; *In re Howard Nat'l Bank*, 2 Low. 487. *Casey v. Cav-aroc*, 96 U. S. 467, is not in conflict with anything herein decided.

There was nothing in the conduct of the petitioner upon which to predicate an estoppel *in pais*.

The judgment of the general term is affirmed, with costs.

Filed April 4, 1889.

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121 168

No. 13,564.

HAYNES ET AL. v. COX.

SCHOOL FUND MORTGAGE.—Sale.—Power of County Auditor.—Burden of Proof.—The county auditor, in making a sale of land in satisfaction of a school fund mortgage, has no power to sell in any other mode than that prescribed by the statute, and the burden is upon one claiming title under such a sale to show that the statutory requirements have been strictly pursued.

SAME.—Selling Part of Mortgaged Land.—Statutory Requirements.—Where the

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auditor, in selling less than the whole tract mortgaged, does not take the quantity sold out of the northwesterly corner of the tract, as required by the statute, but, on the contrary, takes it from another and entirely distinct portion thereof, he exceeds his power and the sale is invalid.

SAME.—Duty of Auditor.—It is the duty of the auditor to offer the mortgaged premises in the manner prescribed by the statute; and, if, after offering it for sale in that manner, no one bids the amount due, he must bid the property in for the use of the fund secured by the mortgage.

SAME.—Quieting Title.—Tender.—Where, in an action in the usual form to quiet title, the defendant sets up title in himself through a sale under a school fund mortgage, no question as to the failure of the plaintiff to tender to the defendant the amount due on the mortgage is presented, unless a failure to make a tender is averred in the answer.

From the Vanderburgh Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellants.

D. B. Kumler and G. F. Denby, for appellee.

COFFEY, J.—This was an action brought by the plaintiff against the defendant, in the Superior Court of Vanderburgh county, to quiet title and to obtain the possession of the land described in the complaint.

The defendant answered in two paragraphs, the first being a general denial. The second paragraph, omitting the formal parts, is as follows: "That on the 18th day of March, 1868, Benoni and Ruth Stinson were the owners of the land in the complaint described; that on that day the said Benoni Stinson and Ruth Stinson, who was his wife, mortgaged to the State of Indiana the southeast quarter of the northwest quarter of section 35, township 6, range 11 west, forty acres, to secure the payment, at the expiration of five years, of the principal and interest of a certain note executed to the State of Indiana by them, in the sum of \$250, which was on that day loaned to said Benoni and Ruth Stinson, and was part of the Congressional Township School Fund of the State of Indiana; that although the whole of said quarter section was so mortgaged, yet, in truth and in fact, on that day the said Stinsons owned only fourteen acres of land in said quarter section,

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which fourteen acres are hereinafter described ; that after the execution of said mortgage the said Ruth departed this life, and thereafter, viz : on the — day of — , 1870, Benoni departed this life intestate, the said indebtedness to the State of Indiana and said mortgage remaining wholly unpaid ; that thereafter, on the 29th day of April, 1871, while said indebtedness so remained unpaid, and said mortgage unsatisfied, a certain partition of the lands of said Benoni was had, in the Vanderburgh Circuit Court, among his heirs, including the fourteen acres ; that the plaintiffs were heirs of the said Benoni, and were parties to said partition ; that such proceedings were had in said action that said fourteen acres were subdivided, by commissioners appointed to make partition, into four lots, numbered from one to four, inclusive ; that lot one contained two acres, lot two, two and one-half acres, lot three, six and one-half acres, and lot four, three acres ; that said lot three was set apart to the plaintiffs in this action, all of which fully appears of record in the office of the clerk of the Vanderburgh Circuit Court, in Order Book 2, p. 290 ; and the defendant files herewith a plat of said fourteen acres of land, and also a plat of said subdivision ; that thereafter, on the 18th day of March, 1872, an instalment of interest became due on said loan, and neither the said Benoni nor Ruth Stinson, nor any person on their behalf, paid or tendered the same ; and therefore the whole of said loan, principal and interest, became due and remained due and unpaid until the 1st day of March, 1873, when the auditor of Vanderburgh county proceeded to collect the same by sale of the mortgaged premises, or so much thereof as was necessary to pay the amount of principal, interest, damages and costs, on the 4th Monday in March, being the 24th day of March, 1873, at the court-house door in Evansville ; that before proceeding to collect said several sums of money by sale of the mortgaged premises, the auditor of Vanderburgh county advertised that he would sell the same, in the Evansville Journal, a newspaper of general circulation printed and pub-

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lished in Vanderburgh county, for three weeks successively, the first of which publications was on the 1st day of March, 1873, and by setting up notices at the court-house door in Evansville, and at other places in the said city, and by posting notices in three public places in Perry township in said county, in which said land is situate, and being three notices in the civil and congressional township where said land is situate, which notices were posted more than three weeks before the day of sale; that on the 24th day of March, 1873, pursuant to the notice so given, the said auditor did offer for sale said mortgaged premises, or so much thereof as was necessary to pay the amount due for principal, interest, damages and costs, to be taken in a square form as nearly as possible off the northwesterly corner of said fourteen-acre tract, and received no bid therefor; that he then offered, in like manner, to sell either of said lots one, two, three and four, or so much thereof as was necessary to pay the amount due, and received no bid for any or either of said lots, except lot three, which the said auditor then elected to sell, and which was wholly unimproved, and after one or more bids were received, he did sell to Martha E. D. Stinson the four-fifths off the east side of said lot three, being five and $\frac{20}{100}$ acres off the east side of said lot, the said Martha's bid being the highest and best bid offered therefor, or at said sale; that the amount of said Martha's bid, and the amount for which said tract was sold, was \$250 due for principal, \$17.29 due for interest, \$5 due for damages, and \$12.50 due for costs, being the exact amount due on said loan; that the treasurer of said county attended said sale and made a statement thereof to the board of commissioners of said county, which statement was signed by said auditor and treasurer, and was afterwards recorded in the office of said auditor and filed in the office of said treasurer; that after said sale the said Martha paid the full amount of her bid, and said mortgage was entered fully satisfied; that on the 25th day of March, 1873, the auditor of said county made, executed, acknowledged,

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entered in the records of the board of commissioners of said county and delivered to said Martha E. D. Stinson a deed of conveyance for the land so purchased by her, and she thereby became the owner in fee thereof; that the said Martha, by her different deeds of conveyance, conveyed all of her interest in said land to this defendant and one Henry Angel, and the said Angel afterwards conveyed to the defendant, whereby he became the owner in fee of all the land so purchased by the said Martha; that the same is part and parcel of the land for the recovery of which this action is brought; and the defendant expressly disclaims any interest in any other portion of said land.

The appellee also filed a cross-complaint, seeking to quiet his title to said land.

The appellants filed a demurrer to the second paragraph of the answer, but the same was overruled and they excepted.

The appellants filed a reply in two paragraphs, the first of which was a general denial.

The second paragraph is substantially as follows: "That said tract of fourteen acres, owned as averred in said second paragraph of answer by said Benoni and Ruth Stinson, embraces lots 1, 2, 3 and 4, set out in said answer; that at the time of said partition, after the death of said Benoni and Ruth, and before said auditor's alleged sale, and before any steps were taken by said auditor to have said sale, said four lots were set off in said partition, and were owned as follows: Said lot number one by —; said lot number two by —; said lot number three by plaintiffs; said lot number four by Martha Stinson, who became such owner as the heir at law of said Ruth and Benoni, and not otherwise; that plaintiffs then were, and ever since have been, residents of the State of Oregon, and not of Indiana; that they had no notice of said pretended notice of sale, or any other proceedings of said auditor, treasurer or any other person, relative to enforcing said mortgage, and they only discovered the same about the date of bringing this suit; that lot one aforesaid

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is in the northwest corner of said fourteen-acre tract, and said lot three is not in the northwest corner thereof, but is in the southeast and central part thereof; that the portion of said lot three claimed by the defendant lies in the southern, central and eastern part of said fourteen-acre tract; that the only notice of said sale was as follows:

“ ‘ PUBLIC SALE.

“ ‘ As provided in sections 87, 95 and 96, of chapter one of the general school law of the State of Indiana, approved March 6th, A. D. 1865, the undersigned will, on the fourth Monday in March, 1873 (being the 24th day of said month), at the door of the court-house in the city of Evansville, in Vanderburgh county, State of Indiana, between the hours of 10 o'clock A. M. and 4 o'clock P. M., offer for sale the following described town lots and lands situate in said county, mortgaged to the State of Indiana to secure loans of common school and congressional township funds, and upon which the borrowers failed to pay the annual instalments of interest and principal due thereon, to wit: Congressional township fund loan, No. 483: The southeast quarter of the northwest quarter of section No. thirty-five (35), in township No. six (6) south, of range eleven (11) west, containing forty acres more or less, in said county. Mortgaged by Benoni Stinson and Ruth Stinson, his wife, on the 18th day of March, 1868. Amount due thereon, \$285.29. Should the foregoing sums remain unpaid on the 24th day of March, 1873 (being the fourth Monday of said month), the undersigned, auditor of said county, will, on said day, proceed to sell the premises mortgaged and described therein, or so much thereof, to the highest bidder, for cash, as may be necessary to discharge the amount due for principal, interest, damages and costs, and in case of no bid for the amount due, the undersigned will bid in the same on account of the respective funds.

“ ‘ PHILIP DECKER, A. V. C.

“ ‘ Per AUG. BRAUNS, Deputy.

“ ‘ EVANSVILLE, March 1st, 1873.’

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“ That, in his pretended notice of sale set out in the answer, said auditor described the land he proposed to sell as the southeast quarter of the northwest quarter of section thirty-five (35), in township six (6) south, of range eleven (11) west, in Vanderburgh county, containing forty acres, and by no other description; that there were no improvements on said land; that, at the time of said alleged sale, said auditor, after having formally offered other parts of said land as alleged in the answer, inquired of by-standers if any one desired to make an offer for any part of said land, whereupon one Lewis C. Stinson, the husband of said Martha, acting as her agent, and for the fraudulent purpose of procuring the sale of plaintiffs' land greatly below its value, and placing the whole burden of said mortgage upon plaintiffs' land, every acre of which was then worth \$200, and the part claimed by defendant was worth \$1,000, then and there, in the name of said Martha, pointed out said particular part of said lot No. 3, claimed by defendant, and at his request said auditor offered the same for sale for the satisfaction of said mortgage, and said Stinson, in the name of said Martha, bid the same in and took a conveyance therefor; and this is all the notice, sale, election to sell and convey described in said answer, and the only sale and conveyance under which the defendant seeks to deprive the plaintiffs of said land, and the alleged ownership of the defendant, and those under whom he claims, as set up in said answer, is wholly based on said pretended auditor's sale; that the request of the said Stinson to have said property sold as aforesaid, and the bidding of the same in, were in pursuance of a fraudulent conspiracy theretofore entered into by said Lewis C. Stinson and the owners of said lots 1, 2 and 4, in order to relieve said lots, of which they were the owners, to wit, lots 1, 2 and 4, from the burdens of said mortgage, and cast the whole of the same upon the plaintiffs' property.”

The appellants withdrew the first paragraph of their reply, and the appellee dismissed his cross-complaint and withdrew

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the first paragraph of his answer. The court then sustained a demurrer to the second paragraph of the reply, and the appellants declining to plead further, a judgment was rendered against them for costs.

The errors assigned in this court are :

1st. That the court erred in sustaining the demurrer of the appellee to the second paragraph of the reply.

2d. That the court erred in overruling the demurrer of the appellants to the second paragraph of the answer of the appellee.

3d. That the court erred in rendering judgment as set out in the record.

Section 4391, R. S. 1881, provides that, before sale of mortgaged premises, the auditor shall advertise the same in some paper printed in the county where the land lies, if any there be, for three weeks successively, and also by notices set up at the court-house door, and in three public places in the township where the land lies.

Section 4392 provides that, at such sale (which shall be at the court-house door), the auditor shall sell so much of the mortgaged premises to the highest bidder, for cash, as will pay the amount due for principal, interest, damages and costs. When less than the whole tract mortgaged is sold, the quantity sold shall be taken in a square form, as nearly as possible, off the northwesterly corner of said tract ; and when less than the whole of any in-lot or out-lot of any town or city shall be sold, the part sold shall be laid out and taken off so that it shall extend from the main or principal street or alley on which said lot fronts, to the rear thereof, to divide the same by a line as nearly parallel with the boundaries of said lot as practicable ; and if less than the whole is sold, the auditor, in his notice of sale, shall indicate off of which side or end of said lot the part to be sold shall be taken ; and if more than one tract of land is included in the mortgaged premises, the auditor shall elect which tract or tracts

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shall be sold, saving to the mortgagor, if practicable, the tract on which his house is located.

Section 4393 provides that, in case of no bid for the amount due, the auditor shall bid in the same on account of the fund, and as soon thereafter as may be shall sell the same, having first caused it to be appraised by three disinterested freeholders of the neighborhood, etc.

The property here involved is neither an in-lot nor an out-lot in any town or city; the statute, therefore, so far as it applies to that class of property, has no application here. The property sold was not taken out of the northwesterly corner of the tract mortgaged, but, on the contrary, was taken out of the central and southeasterly part. The question is, does this departure from the statutory requirement invalidate the sale? This was a sale under a naked power not coupled with an interest, and the auditor was bound to a strict observance of the requirements of the statute regulating such sales. If there was a failure to pursue the statutory authority, there was no valid sale. *Benefiel v. Aughe*, 93 Ind. 401. The judge who delivered that opinion says this has always been the law in Indiana, and in support of this assertion cites *Williamson v. Doe*, 7 Blackf. 12, *Skelton v. Bliss*, 7 Ind. 77, *Key v. Ostrander*, 29 Ind. 1, *Betson v. State, ex rel.*, 47 Ind. 54, *Arnold v. Gaff*, 58 Ind. 543, *Ferris v. Cravens*, 65 Ind. 262, and *Brown v. Ogg*, 85 Ind. 234.

In such sales it is not a question of good faith, but a question of power. The officer has no power to sell in any other mode than that prescribed by the statute. A departure from the statute is presumed to act injuriously against the owner, as it may deter bidders.

The burden is upon the one claiming title under such a sale to show that the statutory requirements have been strictly pursued. *Bonnell v. Ray*, 71 Ind. 141; *Ward v. Montgomery*, 57 Ind. 276; *Steeple v. Downing*, 60 Ind. 478; *Smith v. Kyler*, 74 Ind. 575.

It was the duty of the auditor to offer the mortgaged prem-

ises in the manner prescribed by the statute, and if no one bid the amount due after offering the whole tract, it was his duty to bid it in for the use of the fund secured by the mortgage. When he undertook to depart from this duty he was acting without authority, and his acts had no binding force on any one. As it appears by the answer of the appellee that the county auditor did not pursue the statutory requirements in the sale under which he claims title, it follows that the answer was bad.

It is objected that, considering the shape of the fourteen-acre tract of land, the quantity sold could not have been taken in a square form out of the northwesterly corner. The statute does not require, absolutely, that it should be in a square form; but does require that it shall be as nearly so as possible.

It is further objected that as this was a sale to satisfy a school fund mortgage, the appellants can not quiet their title until they have paid, or offered to pay, the purchaser the amount due on such mortgage. This is, perhaps, true. *Shannon v. Hay*, 106 Ind. 589.

But there is no averment in the answer that appellants have not tendered the amount due on the mortgage. Did the answer contain such an allegation, it would then present a different question from the one it now presents. The complaint is in the usual form for possession and to quiet title, and the answer confesses the allegations made therein, and seeks to avoid them by showing that the title therein averred has been divested by a sale made on a mortgage to secure the school funds of the State.

As it fails to show a valid sale, it is not sufficient to bar the appellants' right of action, and, therefore, the court erred in overruling the demurrer intended to test its sufficiency.

As we have reached the conclusion that the answer is bad, it is unnecessary to examine the reply. A bad reply is sufficient for a bad answer.

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For the error committed by the court below in overruling the demurrer of the appellants to the second paragraph of the answer of the appellee, the cause must be reversed.

Cause reversed, with instructions to the court below to sustain the demurrer to the second paragraph of the answer of the appellee, and for further proceedings not inconsistent with this opinion.

Filed April 4, 1889.

118	194
118	598
123	116
118	194
124	600
118	194
132	586
118	194
146	191
146	194
151	143
118	194
153	488
118	194
155	608
118	194
161	347

No. 14,269.

THE CENTRAL UNION TELEPHONE COMPANY v. THE STATE, EX REL. FALLEY.

TELEPHONE.—*Instrument of Commerce.*—*Common Carrier.*—The telephone is an instrument of commerce, and persons or corporations engaged in the general telephone business are common carriers of news.

SAME.—*Discrimination.*—*Mandamus.*—A person or corporation engaged in operating telephone lines, furnishing connections, facilities and service to business houses, persons and companies, can be compelled by mandate, on the petition of one discriminated against, to furnish to such a one the same service that it furnishes to others, independent of any statutory provision against discrimination.

SAME.—*Character of Service.*—*Statutory Regulation.*—*Rental Charges.*—*Toll-Stations.*—A company doing a general telephone business in this State can not evade the acts of April 8th and April 13th, 1885 (Acts of 1885, pp. 151, 227), prescribing the duties of such companies and regulating the rental to be charged for the use of telephones, by ceasing to do a rental business and establishing public toll-stations, but under such acts any person, within the local limits of the business of such a company in a town or city, has the right to demand and receive a telephone, with connections, facilities and service, at the rate per month fixed therein.

SAME.—*Lines Extending into Other States.*—*Interstate Commerce.*—The acts of

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1885, relating to telephone companies, apply merely to the service to be provided to persons within this State, and they are, therefore, not open to the objection that they are void as attempting to regulate interstate commerce, although the lines of a company doing business in this State may extend into other States.

SAME.—*Violation of Statute.*—*Penalty.*—*Mandamus.*—The fact that the statute prescribes a penalty for the violation of its provisions, does not abridge the right of an aggrieved party to compel the telephone company, by mandamus, to furnish him with the service to which he is entitled.

SAME.—*Municipal Service.*—*Extra Territorial Lines.*—In an action by a resident of a city to compel a telephone company to furnish him with telephonic service within such city, an answer that the lines of the company extend outside of the State, and that by furnishing the plaintiff with an instrument and service he would be placed in communication with points outside of the State, is bad.

From the Tippecanoe Circuit Court.

J. R. Coffroth, T. A. Stuart and A. A. Thomas, for appellant.

W. D. Wallace, S. P. Baird and F. S. Chase, for appellee.

OLDS, J.—This is an action, brought by the relatrix, to compel the appellant, by mandate, to furnish her, at her place of business in the city of Lafayette, a telephone and telephonic connections and facilities. The petition is in one paragraph, averring the following facts: That the defendant, the Central Union Telephone Company, is a corporation duly organized under the laws of the State of Illinois; that it is now, and was at the time of the doing of the acts and things hereinafter complained of, and for three years last past has been, owning and operating a system of telephone lines and wires, and engaged in doing a general telephone business in the city of Lafayette, county of Tippecanoe, State of Indiana; that the relatrix, Susana B. Falley, is now, and for more than three months last past has been, carrying on business under the name and style of the "Falley Hardware Company," and the occupant of a business room in said city, at numbers 37 and 39 on South Third street therein, and her business room is within the limits of the defendant's tele-

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phone business in said city; that the relatrix did, on the 25th day of October, 1887, demand of the defendant that said relatrix be furnished by said defendant with a telephone and telephonic connections and facilities necessary to place the relatrix, at her said business room, in telephonic connection with the patrons of defendant in said city; that the relatrix did then, and at the time of making said demand, tender to the defendant the sum of nine dollars, lawful currency of the United States, as a rental in advance for such telephone, telephonic connections and facilities, for the first three months' use thereof, and at the same time relatrix offered to comply with the reasonable rules and regulations of said defendant, not inconsistent with the laws of this State; that the defendant at the time said demand was made refused, and ever since has wilfully, wrongfully and without cause, failed and refused, and still fails and refuses, to furnish to said relatrix, at her said business room, the use of such telephone and telephonic connections and facilities; that the defendant is a common carrier of telephonic messages between its patrons within the limits of said city of Lafayette, and that said relatrix, under the laws of the State of Indiana, is entitled to demand and receive from the defendant the use of the telephone and telephonic connections, facilities and service, necessary to place the relatrix, at her said business room, in telephonic communication with the patrons of defendant in said city, for the compensation of three dollars per month, as fixed and prescribed by the statute of said State, and for such compensation she is entitled to receive from the defendant the use of a telephone, and the highest and best grade of telephonic connections, facilities and service, used and furnished by said defendant in carrying on its business in said city. Prayer for an alternative writ of mandate, and, on final hearing, a peremptory writ compelling defendant to furnish relatrix with such telephone and telephonic connections, facilities and service, which petition was duly verified. Alternative writ of mandate issued upon the complaint in due

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form, setting forth the filing of the complaint and the allegations of the complaint, and concluding by commanding the appellant to furnish the relatrix with a telephone and telephonic connections and facilities as asked, or in default thereof to appear before the court and show cause.

In answer to the writ, appellant appeared by attorneys and demurred to the writ for the cause that the writ did not state facts sufficient to constitute a cause of action, which demurrer was overruled, to which ruling of the court on the demurrer appellant excepted. Appellant then filed an answer in five paragraphs. The first is a general denial, and the other paragraphs allege the following facts:

2d. The defendant avers that it is a corporation, under the laws of Illinois; that for several years prior to the demand by plaintiff, as alleged in the complaint, defendant had been engaged in carrying on its business as a telephone company in the States of Indiana, Ohio, Illinois and Iowa; that long before, and at the time of, the happening of the things complained of in plaintiff's complaint, defendant had, ever since had, and now has, its lines and wires on its poles in the city of Lafayette, and in various cities and towns in the States aforesaid, and during all of said time, and still has, offices in said various cities and towns in each of said States, connected with each other, and many of its offices and telephones in this State are connected by means of its wires with defendant's offices and instruments in the States of Ohio, Illinois and Iowa; that defendant, during all of said time, was, has been, and is engaged in transmitting messages for the public for hire over its said wires, not only between towns and cities in each of said States, but also between the several States aforesaid; and during all of said time defendant has been, and is, engaged in, and carrying on, interstate commerce; that it admits that plaintiff, claiming that, under the act of the General Assembly of the State of Indiana, she was entitled to have a telephone in her store, and to be furnished with telephonic service under said law, tendered defendant nine

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dollars, and demanded to have a telephone in her store; and defendant admits that it refused to furnish relatrix with a telephone, and with telephonic connections and service, because if defendant had complied with said request and demand she would thereby be furnished facilities for transmitting messages from Lafayette to various places in the States of Ohio and Illinois, where defendant had and has its wires and offices, as aforesaid, for said sum of money, which was unreasonable and greatly less than defendant charges its other customers, and which, as defendant was engaged in carrying on interstate commerce, could not be required of it.

3d. The third paragraph states that it, defendant, is a corporation under the laws of Illinois, and is engaged in carrying on a general telephone business in the city of Lafayette; that, on the 2d day of March, 1886, it in good faith announced to the public, and it was then its intention, from and after the 2d day of March, 1886, not to furnish telephones under a rental system, except as it did so until its contracts then in existence expired; that at said time it had a large number of contracts with its various subscribers in the city of Lafayette for the use of its telephones, by the terms of which defendant was compelled to maintain its exchange in said city, and furnish telephone facilities to said persons until the 30th day of September, 1886; that defendant treated all applications for telephones and telephonic service alike; that, in good faith, and without discrimination, having determined to cease doing a general rental telephone exchange business in this State, it refused to furnish telephones and telephonic connections under a general rental telephone exchange system, except to those with whom it had contracts, as aforesaid; that it admits the demand and tender by relatrix, and the refusal by defendant to furnish her with a telephone, because it had determined to cease, and had in fact ceased, doing a general rental telephone exchange business in said city, and so informed relatrix, and since that time has not been, and is not, engaged in a general telephone business under a

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rental system in said city; that after it had announced its determination to cease doing a general rental telephone exchange business, it, in June, 1886, determined to offer to the public, and did in fact offer to the public, to furnish telephonic service and connections by means of public toll-stations at various points in said city, which system of public toll-stations defendant had in operation at and long before the time of the demand by relatrix for telephone and telephonic connections. Defendant denies that it owns or operates a telephone exchange under the rental system in said city of Lafayette, Indiana, or that it did at the time of the commencement of this action; that, although it had formerly conducted a telephone exchange under the rental system, it abandoned and terminated the same as soon as its contracts in existence were terminated. The defendant avers that what is known as a telephone exchange under a rental system, is where lines and telephone instruments are furnished to subscribers for private use, under contracts limiting the use of the facilities furnished to such subscribers and their employees, for a stipulated rental per month, quarter or year, and in which the instruments furnished pass into the possession of such subscribers; the lines so furnished to subscribers center at a switching-station, where the line of any subscriber is connected with that of any other subscriber, on request, for purposes of communication, authorized by the contract. In the exchange system, a set of telephone instruments, connected by a wire with the central station, is furnished to any reputable person who desires to become a subscriber to the exchange, and signs the usual form of contract, and complies with its conditions. A public toll system of telephone service is one where the telephone company furnishes no instruments or lines for private use for a rental charge, but establishes stations of its own, for the accommodation of the public, in such places as may appear to it necessary to furnish telephonic facilities and connections to the public, charging a toll for each use of its instruments and lines, such toll-

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stations being in charge of agents selected, appointed and paid by the telephone company, the instrument at such station remaining in the possession and control of the company, through its agents; the lines from such stations extend to a switching-station, where one is connected with another upon the order of any agent, which agent collects from the user the toll charged for each and every connection, and accounts for the same to the company; that such toll system is simply an extension of the toll system which the defendant, since its organization for some years past, and prior to the enactment of the telephone statutes in this State, was maintaining, and has maintained, in various towns of this State, providing telephonic facilities between individuals residing in different towns where toll-stations are established; that, at the time of the commencement of this suit it did not, does not now, nor does it intend to, discriminate against the relatrix, and is still, and now is, ready and willing to supply the relatrix, and all applicants, with such facilities as it has in said city.

The paragraph further sets out in detail the manner of operating and conducting the toll-station system, and alleges that all its business in the city of Lafayette, at the time of the commencement of this suit, and ever since, has been conducted on that system, and that it was not at that time, nor since, doing, and does not intend to do, a telephone business under the rental system; that notices of the rates and fees charged for the use of the telephones are posted in each station. A copy of the contract that it enters into with its agent is set out. The answer denies any discrimination against the relatrix, or any intention to discriminate, and alleges that the toll-stations are so distributed as to accommodate the general public, and that there are a number in the vicinity of the place of business of the relatrix, and denies being a common carrier, and denies being bound to rent telephones at all, or as demanded by relatrix; that defendant offered to establish a toll-station on relatrix's said premises, and she refused to allow it to be done, or to sign a contract of agency.

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The following is a copy of the contract set out with this paragraph of answer :

“ CENTRAL UNION TELEPHONE COMPANY—STATION CONTRACT—CENTRAL STATION.

“ This agreement, made this — day of —, 188—, by and between the Central Union Telephone Company, its successors or assigns, party of the first part, and —, party of the second part, witnesseth : The second party agrees : 1st. To permit the party of the first part to place its wires, fixtures, telephone instruments and apparatus in and upon the premises of the second party, located on — street, in the — of —, county of —, in the State of Indiana, for the purpose of doing a general telephone and telegraph business ; that he, —, said second party, is to furnish proper office room, rent, light and fuel, and necessary employees to transact all business of the party of the first part, at said station, in a prompt and business-like manner ; to collect for all such business such regular rates as may be fixed from time to time by the party of the first part, and the same to account for to the said first party ; and further, to observe and conform to such rules and regulations touching said business as may from time to time be prescribed by said first party. In consideration thereof, and in full payment therefor, the first party agrees to pay to the second party five per cent. commission upon the receipts at said station for business with regular stations within — miles of the county court-house in said —, and — upon receipts for business going over to extra-territorial lines of the first party. It is further mutually agreed that should the telephone or telegraph station herein referred to fail to be sufficiently remunerative, or its management by the party of the second part prove to be unsatisfactory to the party of the first part, the right to terminate this agreement at any time is reserved by the party of the first part ; but otherwise, this agreement is to be in force and effect until the last of —, 188—, and

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thereafter until the party of either part shall have given the party of the other part ten days' written notice of his or its desire to discontinue the same. Witness the hands of the parties," etc.

4th. The fourth paragraph alleges the ceasing to do business by the defendant under the rental system and conducting the same under a toll-station system, as alleged in the third paragraph, and avers that one Edward E. Falley is a partner of relatrix, and that they are trading under the name of "Falley Hardware Company," and that prior to the demand by relatrix for a telephone; as set out in the complaint, defendant had a telephone in their place of business under the toll-station system, and said firm acted as the agent of defendant in the operation of the telephone; that said firm terminated said contract of agency and the relatrix then made the demand as alleged, and defendant refused for the reasons as stated in the third paragraph of answer.

The fifth paragraph is not in the record.

Appellee filed separate demurrers to the second, third, fourth and fifth paragraphs of answer for the cause that neither of said paragraphs stated facts sufficient to constitute a defence or return to said alternative writ of mandate.

The first paragraph of answer was withdrawn by appellant, and the court sustained the demurrers to the second, third, fourth and fifth paragraphs; to which ruling of the court in sustaining the demurrers to the several paragraphs of answer appellant duly excepted, and appellant failing to amend or plead further, the court rendered judgment on said demurrers, ordering and adjudging that a peremptory writ of mandate issue, commanding appellant to forthwith furnish and supply relatrix, at her business rooms, numbers 37 and 39 South Third street in the city of Lafayette, Indiana, with a telephone, and with the highest and best grade of telephonic connections and facilities and service used, furnished and employed by said appellant in carrying on its said business in said city, and that might be necessary to place her, at her said

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place of business, in telephonic communication with all persons in said city having at their places of business or residences telephones placed and maintained there by said appellant; and that said appellant continue to supply and furnish the same, etc., so long as appellant continued to carry on a general telephone business in said city, and so long as relatrix shall continue to observe the reasonable rules, etc., and pay the compensation of three dollars per month. To the rendering of which judgment the appellant excepted. Appeal prayed and granted to this court. Errors are properly assigned on the rulings of the court.

This action is brought under the acts of 1885, prescribing the duties of telephone companies, and to regulate the rental to be paid for the use of telephones, and requires a construction of these acts. On April 8th, 1885, the following law was enacted:

“AN ACT prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency.”

SECTION 1. Relates exclusively to telegraph companies.

“SEC. 2. Every telephone company, with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone company's business, supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facili-

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ties that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.

“SEC. 3. Any person or company violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction: *Provided*, Nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise.” Acts of 1885, p. 151.

On the 13th of April, 1885, another law was enacted, which is as follows:

“AN ACT to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation.

“SECTION 1. That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State, shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding three dollars per month where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

“SEC. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

“SEC. 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be

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fined in any sum not exceeding twenty-five dollars." Acts of 1885, p. 227. This act took effect July 22d, 1885.

It is insisted by appellant that the act of April 8th is simply an act prohibiting discriminations by telephone companies, and providing a penalty for any discrimination by such companies, and that the act of April 13th prescribes the price which may be charged for the rental of telephones, when the same are rented, and prescribes penalties for asking or taking a greater rental, and that unless they inhibit all other systems or methods of telephony, other than the rental, this case was decided wrongly by the court below; and that the title to the act of April 8th declares it to be an act prohibiting discrimination between patrons, and prescribing penalties therefor.

It is further claimed by appellant that the answers show that appellant was not engaged in a general telephone business at Lafayette at the time of appellee's demand, but was engaged only in a limited business, and that it offered to furnish appellee such limited service, and has in all respects offered to treat her in the same manner as it was treating its other patrons, but that she wanted a different service than that in which appellant was engaged; in other words, she wanted appellant to discriminate in her favor, and to grant her demand would make appellant amenable to the law against discrimination.

In determining this case it is important to consider the nature of the telephone, how operated, the utility of it, and the rights of the parties in the absence of the statutes enacted by the Legislature. The telephone differs from the telegraph very materially, in this, that the transmission of news, the sending and receiving of messages by telegraph, can only be done by those having a knowledge of the business, and having a knowledge of the art and science of telegraphy. To others, who are not telegraphists, the telegraph would be useless. It is, therefore, only beneficial to the general public when operated by persons or companies keeping in their em-

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ploy telegraphists, to send, receive and transmit messages, and messengers to deliver them to persons to whom addressed. A telegraphic instrument in the house or place of business of a patron of the company, connected with the wires of the company, with facilities for transmitting and receiving messages by telegraph, would be of no use to a patron, unless he was learned in the art of telegraphy. But the telephone is entirely different; a telephone, with proper connections and facilities for use, can be used by any person; it requires no experience to operate it. Webster defines it as "An instrument for conveying sound to a great distance."

In the case of the *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1, the word "telephone," as used in the act of April 13th, 1885, was held to mean "an organized apparatus, or combination of instruments, usually in use in transmitting, as well as in receiving, telephonic messages." By the use of the telephone, persons are enabled to converse with each other while in their respective business houses or residences, a great distance apart. Although of recent date, it has become of important use in the transaction of business, and there is no other invention or device to supply its place. While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. ¶ It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce and a common carrier of news, the same as the telegraph, and by reason of being a common carrier, it is subject to proper obligations and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. ¶ To conduct the business of the telephone by public telephone stations and by sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city, to compel the person desiring to converse with others to remain at the public tele-

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phone station until the persons with whom they desire to converse can be notified and so arrange their business as to leave and go to another telephone station and hold the conversation, renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their homes or their places of business, call up another at a great distance with whom they have important business, and converse without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination?

Any person or corporation engaged in telephone business, operating telephone lines, furnishing telephonic connections, facilities and service to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others. This has been held in the cases of *State v. Nebraska Telephone Co.*, 17 Neb. 126; *Vincent v. Chicago, etc., R. R. Co.*, 49 Ill. 33; *People v. Manhattan Gas Light Co.*, 45 Barb. 136. And the principle held in these cases is in accordance with the well settled rules governing common carriers.

It is not controverted in the argument by counsel for the appellant that the Legislature had the right to regulate the price to be charged and collected for the use of telephones and telephonic connections, facilities and service; and even if it were controverted, it is well settled by authorities that the Legislature has the right to do so, relative to the business conducted within the State. *Hockett v. State*, 105 Ind. 250, and *Central U. Tel. Co. v. Bradbury*, *supra*, and authorities cited in those cases; *Johnson v. State*, 113 Ind. 143; *Munn v.*

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Illinois, 94 U. S. 113; *Ouachita Packet Co. v. Aiken*, 121 U. S. 144; *Patterson v. Kentucky*, 97 U. S. 501.

The telephone company being liable for discriminating between persons and companies, and the person or company discriminated against having a remedy without the enactment of section 2 of the act of April 8th, 1885, there was no occasion for the statute on that account alone. Then what was the purpose and object of the two statutes set out?

It should be presumed the Legislature had some purpose and object. If section 2 of the act of April 8th was only to prevent discrimination, and section 1 of the act of April 13th only to fix the price for the rental of telephones when the telephone company was operating under a rental system, then all that the companies operating telephone lines would have to do would be to cease to operate their business under a rental system, and charge so much for each conversation; or, as they have done in this case, establish public telephone stations, and then charge for each separate use of the telephone, and they might thereby derive a greater income for the use of the telephone, and render to the public much inferior service, and yet avoid liability under the statute. We do not think such was the object or purpose of the statute, or that such construction can be placed upon it.

It was the evident intention of the Legislature that where a telephone company was doing a general telephone business in this State, any person within the local limits of its business in a town or city should have the right to demand and receive a telephone and telephonic connections, facilities and service, the best in use by such company, and should only be liable to be charged and to pay three dollars per month therefor. With this construction only are the statutes of any benefit to the citizens of the State. The Legislature fixed what, in the judgment of that body, was the maximum price that should be charged for the service, and placed it in the power of each individual, and gave him the right, to demand and receive such service within the limits of the company's

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business, in any town or city where such company is doing a general telephone business.

It is insisted, as it appears by the answer that the lines of the appellant extended through the States of Ohio, Indiana and Illinois, that appellant was engaged in interstate commerce; that it was a common carrier of news between the States, and that therefore such statutes are an interference with interstate commerce. We can not agree with that theory. These statutes simply provide that telephone companies shall provide persons within this State with certain service, and for such service shall receive a certain compensation. They only seek to control the service within this State. If section 2 of the act of April 13th, providing for the price to be paid for connections between two cities or villages, should be construed to apply to two cities or villages, one of which was without this State, then there would be some question as to the validity of that section, or the power of the Legislature to control the price to be paid for a message or the use of the telephone for communicating with a person beyond the limits of the State; but that question is not involved in this case, as one section of a statute may be valid and another not. Telegraph companies stand upon a different footing, in some respects, from that of telephone companies; they have been granted some rights and privileges by acts of Congress which can not be abridged or interfered with. In the case of *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, referred to by counsel for appellant, it was held that the act was void in so far as it sought to govern the delivery of messages outside of the State. *State v. Newton*, 59 Ind. 173.

It is also contended by counsel for appellant that, as the statute provides a remedy other than that by mandate for a violation of the statute, the writ of mandate is not a proper remedy.

The right to have the telephone and telephonic connections

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and facilities is a right given by the statutes. It is a legal right, which may be enforced by mandate. No remedy is adequate which does not give the person that to which he is entitled by law ; the penalty of one hundred dollars is cumulative, and does not abridge or take away the right to a writ of mandate. The statute itself provides that the act shall not be so construed as to " abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise." The statute should be so construed as that the penalty shall not take away any of the other remedies the aggrieved person may have, one of which remedies is by writ of mandate. This court held, in the case of *Central U. Tel. Co. v. Bradbury*, *supra*, that Bradbury was entitled to his remedy by writ of mandate compelling the company to furnish him with a telephone and telephonic service. The right to a writ of mandate requiring telephone companies to furnish telephonic service to persons entitled thereto has been held in *State v. Telephone Co.*, 36 Ohio St. 296, also by the Supreme Court of Pennsylvania, in *Bell Telephone Co. v. Commonwealth*, 3 Atlantic Rep. 825. In this case the complaint states a good cause of action under the statutes.

The second paragraph of the answer alleges the conducting of the defendant's business in the several States, and that it is engaged in interstate commerce, and that to furnish relatrix with an instrument and connections with its lines would put her in connection with its offices outside of the State and furnish her facilities for transmitting messages from Lafayette to various places in Ohio and Illinois, where the appellant has its wires and offices. This paragraph does not controvert the facts alleged in the complaint, that appellant, at the time of the acts and things complained of, etc., was owning and operating a system of telephone lines and wires and engaged in doing a general telephone business in the city of Lafayette, and that the place of business of the relatrix is within the limits of the appellant's telephone business in

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said city ; and it must also be remembered that the demand, as alleged in the complaint, was only that she be furnished with a telephone and telephonic connections and facilities necessary to place her, at her said store, in telephonic communication with patrons of appellant in said city. The statutes contemplate two kinds of service and different compensations for each : one, connections and facilities for conversing with patrons of the company within any city or town where an exchange is maintained ; the other, for conversing between two towns or cities.

The other paragraphs show the appellant to have been engaged in a general telephone business in said city, operating the same under a toll system at the time of the demand and tender by relatrix, and do not controvert the allegations in complaint that the plaintiff's place of business is within the local limits of appellant's business in said city. Neither of the paragraphs of answer is sufficient.

Under the construction we have given the statutes, there was no error committed by the court below in overruling the demurrer to the complaint, sustaining the demurrers to the answers or in granting the writ of mandate.

The judgment is affirmed, with costs.

Filed Jan. 22, 1889 ; petition for a rehearing overruled April 3, 1889.

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118	212
124	508
118	212
144	74

No. 12,796.

BABCOCK ET AL. v. THE PEOPLE'S SAVINGS BANK.

WAREHOUSE RECEIPTS.—*Endorsee for Value.*—*Liability of Warehousemen to.*

—Where warehouse receipts were issued, providing that the property described therein should be delivered only on return of the certificates properly endorsed, and the warehousemen delivered the property without the return of the warehouse receipts, they are liable to an endorsee of the warehouse receipts who in good faith loaned money upon them. They will not be heard to dispute the endorsee's title, nor to aver that they did not receive the property on the terms specified in the receipts.

SAME.—*What They Represent as True.*—*Innocent Parties.*—*Reliance on Representations.*—The warehouse receipts issued by the appellants represent as true two very essential things: 1. That the warehousemen received the property mentioned in the receipts as warehousemen. 2. That the property will be delivered only on the return of the certificates, properly endorsed. The warehousemen, and not an innocent third party who has relied on their representations, must bear the loss.

SAME.—*Representations.*—*Withdrawal of.*—*When Can Not be Done.*—It is a general rule that one who makes representations can not withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud.

From the Vanderburgh Circuit Court:

J. S. Buchanan and *C. Buchanan*, for appellants.

J. M. Shackelford, *R. D. Richardson* and *J. T. Walker*, for appellee.

ELLIOTT, C. J.—The appellants were warehousemen, and as such received and stored grain for hire. They received from Elles & Knauss a large quantity of flour, and issued to them warehouse receipts. There are several of these receipts, but, except as to dates, quantity, and the like, the language in each of them is the same. They read thus: "Received from Elles & Knauss, in our William Street Warehouse, on storage from L. & N., 140 barrels of flour, to be delivered

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only on return of this certificate, properly endorsed, and payment of charges and insurance.

(Signed) "E. S. BABCOCK & SON."

The appellee, in good faith, lent Elles & Knauss four thousand dollars, and they endorsed and delivered to it the warehouse receipts. After this had been done the appellants delivered the flour to the depositors, Elles & Knauss, or some other persons, without the return of the warehouse receipts.

Our judgment is, that the endorsee of the warehouse receipts issued by the appellants having, in good faith, loaned money upon them, is entitled to the possession of the flour, or to its value, and that the appellants can not be heard to dispute the endorsee's title, nor to aver that they did not receive the property on the terms specified in the receipts. Those instruments represent as true two very essential things: that they, the warehousemen, received the property mentioned in the receipts as warehousemen, and that it will be delivered only on the return of the certificates, properly endorsed.

The plainest principles of justice require that the appellants should not be permitted to deny what they represented, and thus cause loss to one who, in good faith, acted upon their statements, and loaned money upon the faith of their representations. Our conclusion is right, as we believe, in principle, and is, we know, well sustained by the authorities. *Planters, etc., Co. v. Merchants Nat'l Bank*, 78 Ga. 574; *McNeil v. Hill*, 1 Wool. (C. C.) 96; *First Nat'l Bank v. Bates*, 1 Fed. Rep. 702; *Whitlock v. Hay*, 58 N. Y. 484; *Stewart v. Phoenix Ins. Co.*, 9 Lea, 104; *Colebrooke Coll. Secur.*, p. 506. By issuing these receipts, the warehousemen represented that they had the flour in their warehouse, and would there keep it until the certificates were returned, and they, and not an innocent third person, who has relied on their representations, must bear the loss. *Quick v. Milligan*, 108 Ind. 419; *Preston v. Witherspoon*, 109 Ind. 457; *Cowdrey v. Vanderburgh*, 101 U. S. 572. The question here is between the parties by whom the instruments containing the representations were

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issued, and a person who, in the usual course of commercial business, has acted upon the representations contained in those instruments, and, therefore, the case of *Adams v. Merchants Nat'l Bank*, 9 Biss. 396, is not in point. We neither approve nor disapprove the decision in that case; we simply deny its relevancy. It is a general rule that one who makes representations can not withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud. *Anderson v. Hubble*, 93 Ind. 570; *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 301.

Judgment affirmed.

Filed April 3, 1889.

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128	234

No. 12,836.

THE EVANSVILLE AND INDIANAPOLIS RAILROAD COMPANY
ET AL. v. HAYS, TREASURER.

TAXATION.—Assessment.—Board of Equalization.—Power of to Make.—Where the county board of equalization ordered certain railroad iron to be assessed for the purpose of taxation, ascertaining its value from the surveyor of customs in whose charge it was at the time, or from some other person not an officer of the railroad company, and the auditor, by direction of the board, made the entry on the assessor's roll, and afterwards entered it upon the treasurer's books, such an assessment is invalid, and does not create any lien on the property.

SAME.—Valid Assessment.—What Constitutes.—To constitute a valid assessment it must be made by the proper officer. There must, at least, be some attempt toward an assessment, and a compliance with the law by some officer authorized to make the assessment. The county board had no such authority in this instance.

SAME.—Illegal Assessment.—Suit to Recover Taxes.—Where there has been

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an illegal assessment, the county treasurer can not maintain an action to recover the taxes so illegally assessed. *Board, etc., v. Armstrong*, 91 Ind. 528, and *Durham v. Board, etc.*, 95 Ind. 182, distinguished.

From the Vanderburgh Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellants.

W. F. Smith, for appellee.

OLDS, J.—The facts, as stated by counsel for appellants, and not controverted by counsel for appellee, are : The Indianapolis and Evansville Railway Company was building a railroad from Evansville to Washington, Indiana. In order to build the road, the president and manager of the corporation imported steel rails from London to Evansville, via New York. Not being able to pay the freight and duties, the rails were warehoused, under the warehouse system of the Treasury Department, under the provisions of chapter 7, of the U. S. R. S. ; in lieu of an actual warehouse or place of storage, they were stored on the grounds of the E. & T. H. Railway Company, who had the rails in charge, with a lien for the carriage. They were taken charge of by the surveyor of the port, as unclaimed goods, under section 2965, U. S. R. S., and, by consent of all the parties, stored in the yard of the Evansville & Terre Haute Railway Company, and guarded by a watchman of the surveyor. While in that position an attempt was made to make an assessment upon them for State and county taxes for the year 1882. The railroad corporation being insolvent, the steel rails afterwards went into the hands of a receiver, and were sold, with the road-bed and other property, to the appellant, the Evansville and Indianapolis Railroad Company, a corporation organized by the shareholders and bondholders of the old corporation, who bought the road-bed, steel and fixtures, and assumed the payment of all liens. The appellee, being treasurer of the county, filed his claim, by an intervening petition, for the taxes which were alleged to be assessed. The intervening petition was pending when the property was sold, and there was a stipu-

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lation by which it was agreed that the purchasers of the road-bed and steel should be subrogated to the rights of the receiver in the steel, and should assume his obligations as to liens. After the sale of the steel, the county attorney withdrew the formal petition, and filed one in the nature of a complaint, to which the railroad company and receiver entered an appearance. The proceedings were conducted with appellee as plaintiff and appellants as defendants. Answers were filed and issues joined; trial and judgment against the Evansville and Indianapolis Railroad Company for the taxes. Appellants filed a motion for a new trial, which was overruled, and exceptions taken by appellants. The question presented is as to the sufficiency of the evidence. It was admitted, for the purpose of the trial, that in the months of October, November and December, 1881, there was shipped from the city of London to the city of New York about 3,061 tons 1,934 pounds of steel rails, consigned to the Indianapolis and Evansville Railway Company; that said steel rails were subject to duty, being imported, and passing through New York, consigned to said railroad company, at Evansville, and subject to customs duty and freight from New York to Evansville; that when the said rails arrived at Evansville, there being no person to pay freight or duty on the same, they were taken charge of by the surveyor of the port at Evansville and stored as unclaimed goods; that said steel rails were, in June, 1882, of the value at Evansville of \$55 per ton, or \$169,000; that the duty amounted in the aggregate to \$57,236.82; that the freight due upon said rails was the sum of \$19,840.28, making a total of charges of \$77,077.10; that, while said steel rails were so held by the surveyor, in the custody of the government, for the payment of said customs dues, and liable to a lien for said sum for freights and charges thereon, to wit, on the 17th day of June, 1882, the auditor of Vanderburgh county made upon the assessment roll of Pigeon township the following entry: "Ass'd by board of equlz., R. G. Hervey, iron in hands at E. & T.

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H. R. R. grounds, \$180,000," but that no entry or order in the minutes of the proceedings of the board of equalization, for the session of June, 1882, was recorded, nor does any other record of assessment appear; that the county auditor thereupon, afterwards, transferred said entry from the assessor's roll to the tax duplicate, in the following words: "No. 2724. R. G. Hervey, personal property; valuation, \$180,000; total taxes, \$1,440;" that said R. G. Hervey was president and general manager of the Indianapolis and Evansville Railway company; that afterwards, to wit, at the end of the year from the time said steel rails arrived at Evansville, the same were advertised by the surveyor of customs of the United States at the port of Evansville, for the payment of said duty, freight and charges; but before the sale, to wit, on December 12th, 1882, upon the claim of said railroad company, and upon giving proper bond, said steel rails were re-warehoused, and remained there until after the appointment of the defendant, Hepburn, as receiver, by the superior court of Vanderburgh county, in March, 1883; that said steel rails were taken from the custody of said surveyor of the port, and out of bond, and out of the control and custody of the United States authorities, and used in the building of the railroad for said railroad company during the summer and fall of 1883; that the defendant the Evansville and Indianapolis Railroad Company, a railroad corporation, had purchased the property of the Indianapolis and Evansville Railroad Company, and in such purchase had taken the railroad iron and steel described in the complaint under such purchase, and that by the purchase aforesaid said Evansville and Indianapolis Railroad Company had assumed to pay all liens upon said personal property, and that if said personal property was liable for State and county taxes in Vanderburgh county, for the time claimed in the complaint, plaintiff was entitled to recover the amount found due against said property, upon the complaint and the evidence, of and from the defendant the Evansville and Indianapolis Railroad Com-

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pany ; that the rate for taxation for State and county purposes for the year 1882 in Vanderburgh county, Indiana, was eighty cents on the hundred dollars.

It was then proved by parol testimony, over the objection of the appellants, that, at the meeting of the Vanderburgh county board of equalization, the matter of railroad iron in the yard was brought to the attention of the board, and the question of valuation was brought up ; and the board, ascertaining the value from the surveyor, or some other person not an officer of the railroad company, ordered it assessed ; and the auditor, by direction of the board, made the entry on the assessor's roll as hereinbefore set out, no entry being made in the minutes of the proceedings of the board.

There are two questions presented: First. Were the steel rails in controversy subject to taxation ? and, Second. Were they properly assessed for taxation for State and county purposes for the year 1882 ? If they were not subject to taxation, or were not properly assessed for taxation, the appellee can not recover ; and, in view of the opinion we entertain in regard to the latter question, it will not be necessary to consider the first. There is no controversy as to the fact that the only attempt to assess the property was made by the board of equalization ; that, by the direction of the board, the auditor made the entry on the assessor's roll, and afterwards entered it upon the treasurer's books. In the case of *Kuntz v. Sumption*, 117 Ind. 1, this court held that the statutory provisions concerning the authority of the county board of equalization to increase the valuation of the property of an individual taxpayer, listed by him for taxation, are unconstitutional. In that case this court says: " We do not affirm that the provisions of the statute conferring authority upon the county board to change the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting taxpayers generally. We do, however, affirm that they are invalid in so far as they assume to confer

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authority upon the board to conclusively change the valuation placed upon property by an individual taxpayer, or to add property to his list." The attempted assessment of the steel rails by the board of equalization was invalid, and created no lien upon the property. It is insisted by counsel for the appellee that if the property was subject to taxation, it made no difference how it came to be placed upon the tax duplicate; that, whether there was any legal assessment or not, the appellant can not avoid the payment of the amount of taxes the property would be legally liable for if properly assessed, and cite the cases of *Board, etc., v. Armstrong*, 91 Ind. 528, and *Durham v. Board, etc.*, 95 Ind. 182, as supporting this doctrine. We can not concur in the theory of the counsel. Both of the cases cited were actions brought to recover back taxes paid under irregular and illegal assessments, and the court held that having paid the taxes, and the property having been subject to taxation, they could not be recovered back. But a different rule applies where the tax has been paid and the action is to recover back than applies where the action is to recover the tax. If the rule insisted upon is made to apply in a case like this, then there is no necessity for an assessment at all; the county auditor may enter up such an amount of tax as he may deem proper against each taxpayer, and, if he fails to pay, the treasurer can bring an action and recover the amount he would have been liable for if properly assessed, for in this case the attempted assessment was without authority and was utterly void, and is the same as if no assessment had been made. The case of *Board, etc., v. Senn*, 117 Ind. 410, is a case where there had been an assessment of real estate, and the board of equalization had increased the valuation in the township where Senn's real estate was situate fifteen per per cent., and after the board adjourned the auditor added twenty-five per cent. in addition and placed it upon the tax duplicate, and the taxpayer, Senn, paid such taxes and afterwards brought an ac-

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tion to recover back the amount paid by reason of such illegal assessment by the auditor. It was claimed in that case, as the law provided that real estate should be assessed at its real value, that the land was worth the full amount of the valuation fixed by the auditor, and proof of the real value of the real estate was proper, and that if it was in fact worth what it had been valued at by the auditor, Senn could not recover back any of the taxes paid by reason of such increased valuation by the auditor; but this court held otherwise—that Senn was entitled to recover back the tax paid by reason of the amount added to the valuation by the auditor, and that proof of the value of the land was not proper. We do not hold that the law must be complied with in every minutia in order to enforce the payment of taxes, but there must at least be some attempt toward an assessment and a compliance with the law by some officer authorized to make the assessment.

Cooley on Taxation (2d ed.), chapter 12, pp. 351, 352, 353, speaking of assessments, says: "It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment." Again the same author says: "An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own, the most important

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security which has been devised for the protection of the citizen in tax cases might be rendered valueless. The assessment must, therefore, be made by the proper officer, or it will be void."

In this case there was no attempt made to assess the property, except by the board of equalization, and the action taken by the board, under the authority we have cited, was void and of no effect. It does not appear from the record that any person connected with the railroad company had any knowledge that the board was inquiring into the matter or attempting to make any assessment. We express no opinion as to whether the property assessed is not railroad property, subject to being listed and assessed under the statutes regulating the listing and assessment of railroad property. The court erred in overruling the motion for a new trial.

Judgment reversed, at costs of appellee, and for further proceedings not inconsistent with this opinion.

Filed April 3, 1889.

No. 13,626.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILROAD
COMPANY v. BILLS.

PLEADING.—*Amendment of Complaint.*—An amended complaint has relation ordinarily to the date of the commencement of the action, and is regarded as a matter occurring in the continuation of the original cause.

SAME.—*Statute of Limitations.*—Unless some new claim or title, not previously asserted, is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced.

118	221
120	302
118	221
134	103
134	500
136	422
118	221
140	64
118	221
152	30
118	221
162	110
118	221
166	160

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SAME.—*Action for Personal Injuries.*—Where a complaint seeking to recover for being wrongfully expelled from a train is filed within two years from the doing of the act complained of, an amended complaint, filed after that time, seeking to recover merely for being expelled from the train with unnecessary violence, is not barred.

RAILROAD.—*Expulsion from Train.*—*Unnecessary Force.*—*Damages.*—*Negligence.*—*Evidence.*—In an action to recover damages for injuries sustained by being ejected from a train with excessive force, there is no question of negligence or of contributory negligence in the case, and it is error to permit the plaintiff to prove that he was upon the train in pursuance of information given him by the defendant's ticket agent that the train would stop at the station where he wanted to alight.

SAME.—*Right of Trespasser to Recover.*—Such an action is for an unlawful invasion of the plaintiff's right of personal security, and proceeds upon the correct assumption that he is entitled to recover for injuries sustained by being ejected from the train with needless violence, even though he was upon the train without right.

From the Madison Circuit Court.

N. O. Ross, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

MITCHELL, J.—Bills sued the railroad company, and charged in his complaint that he had sustained grievous injuries to his person by being expelled from one of the company's passenger trains with unnecessary force. The case was tried upon an amended complaint, and the plaintiff had judgment upon the special verdict of a jury. The defendant pleaded the statute of limitations, alleging in its plea that by the original complaint, which had been filed within two years from the date of the alleged injury, the plaintiff sought to recover for injuries sustained to his person and property while being wrongfully expelled from the defendant's cars; that the complaint to which the plea was filed counts upon a right to recover for injuries suffered by being expelled from the train with unnecessary force, and that the amended complaint was not filed within two years from the date on which the cause of action therein mentioned accrued. The court committed no error in sustaining a demurrer to the plea. An amended complaint has relation ordinarily to

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the date of the commencement of the action, and is regarded as a matter occurring in the continuation or progress of the original cause. Unless, therefore, some new claim or title, not previously asserted, is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced. *School Town of Monticello v. Grant*, 104 Ind. 168; *Evans v. Nealis*, 69 Ind. 148. See, also, *Sidener v. Galbraith*, 63 Ind. 89, and cases cited.

Conceding the rule to be substantially as above enunciated, it is contended on the appellant's behalf that the answer was sufficient, nevertheless, because, the argument is, the amended complaint sets up a claim or cause of action not previously asserted. We do not concur in this view. Both complaints involve the same transaction. The *gravamen*, or substantial grievance complained of in both, is the personal injury suffered by the plaintiff in being ejected from the defendant's train. The original complaint proceeded upon the theory that the plaintiff sustained an injury to his person by being wrongfully expelled from a train on which he had a right to be. The amended complaint is predicated upon the same transaction and injury, but proceeds upon the theory that the plaintiff may have been wrongfully or carelessly on the train, and that he was ejected therefrom with unnecessary force, to his injury.

The first complaint was more comprehensive than the last, and embraced elements of damage which were not in the amended complaint, but the last embraced nothing that was not covered by the first.

It is next contended that the court erred in rendering judgment in favor of the plaintiff below on the special verdict returned by the jury. This contention rests upon the proposition that it is neither directly nor inferentially found that the plaintiff was without contributory fault on his part.

The doctrine of contributory negligence is not relevant to a case like the present, and parties must be consistent with

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the theory on which their case proceeds, let the consequences fall where they may.

As we have seen, the action is to recover damages for injuries alleged to have been sustained by the plaintiff in being ejected from the defendant's train with excessive force and violence. Such an act is essentially unlawful. It is equivalent to an assault and battery, and no degree of carelessness on the part of the person assaulted furnishes any excuse for an unlawful invasion of the right of personal security. Beach Cont. Neg., section 22.

Contributory negligence is no defence against an intentional wrong. Every railroad company is bound to take notice of the liability of persons about to become passengers to board the wrong train, either by mistake or through ignorance or neglect. Instead of subjecting such persons to needless violence, it is the duty of the company to afford them all reasonable protection, and while no one is entitled to remain on a train in defiance of the rules and regulations of the company, its duty is to stop its train at some suitable place and use all reasonable precautions in affording one thus situated an opportunity to alight therefrom in safety. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26; *Rounds v. Delaware, etc., R. R. Co.*, 64 N. Y. 129.

It appeared in evidence that the plaintiff, desiring to be carried from Elwood to Curtisville, a distance of about six miles, purchased a ticket and entered upon one of the company's through trains, which, according to the published schedule, did not stop at the station last named. When he exhibited his ticket to the conductor he was informed by the latter that the train did not stop at the place to which he was destined, and that he must either pay his fare to a station beyond, or that the train would be stopped then and he could get off. The plaintiff chose the latter alternative, but claims that the conductor inflicted unnecessary and unlawful violence upon him while alighting from the train.

The plaintiff was permitted to testify, over objection, that

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before purchasing the ticket at Elwood he inquired of the ticket agent whether the train would stop at Curtisville, and that he was informed that it would, and that he thereupon purchased his ticket and got upon the train when it arrived.

This evidence could only have been admitted for the purpose of showing that the plaintiff was not a trespasser, or that he was not guilty of negligence in entering upon the train from which he was expelled. As we have already seen, there was no question of negligence or contributory negligence in the case. It was an action for an unlawful invasion of the plaintiff's right of personal security, and proceeded upon the correct assumption that he was entitled to recover for injuries sustained by being ejected from the train with needless violence, even though he was upon the train without right. It was, therefore, wholly immaterial to any issue in the case to prove that he had acted with proper care in entering upon the train, or that he was brought into the situation in which he was found by the mistake of the ticket agent.

While a passenger has a right to rely upon information received from a ticket agent, when purchasing a ticket, as to matters relating to the places where the train upon which he desires to embark will stop, and to recover from the company all resulting damages in case he is misled without his own fault, he has no right to remain upon a train without paying additional fare, contrary to the rules of the company, after he has been notified that the train will not stop according to the information received from the ticket agent. The conductor can not be required to deviate from the rules under which he is compelled to run his train, nor to run his train except in conformity to the schedule, which the law requires shall be posted up for the information of all, upon the statement by a passenger of information received from a ticket agent. *Pittsburgh, etc., R. W. Co. v. Nuzum*, 60 Ind. 533; *Lake Shore, etc., R. W. Co. v. Pierce*, 47 Mich. 277; *Yorton*.

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v. *Milwaukee, etc., R. W. Co.* 54 Wis. 234; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13, and cases cited; 2 Wood R. W. Law, 1415.

The passenger's right to recover damages which he may have sustained by being misled by the ticket agent, is a right of action altogether different and distinct from one which arises out of an assault and battery committed upon him by the conductor in ejecting him from the train with needless violence. If the plaintiff was damaged by the misinformation negligently communicated to him by the defendant's ticket agent, he has his right of action for that yet, and it was therefore prejudicial error to permit him to prove the negligence of the ticket agent and get the benefit of that element in the present case, while the defendant was deprived of any right to insist that the plaintiff was guilty of contributory negligence. If the question had been upon the company's negligence, arising out of the conduct of its ticket agent, then the doctrine of contributory negligence would have been applicable. Possibly the plaintiff was negligent in not looking at a train schedule, which may have been at hand, or he may have known, for all that appears in this case, that the train did not usually stop at Curtisville. It can not be said that the evidence was harmless. This is only another application of the rule that a party will be bound by the theory upon which his case proceeds, through all its stages.

The judgment is reversed, with costs.

Filed April 5, 1889.

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No. 11,912.

MARTIN v. MARTIN ET AL.

PLEADING.—Answer.—Denial.—A paragraph of answer setting out facts which amount to a denial of the cause of action stated in the complaint, is good.

STATUTE OF LIMITATIONS.—Real Estate.—Specific Performance of Contract.—Quieting Title.—Under section 294, R. S. 1881, actions for the specific performance of a parol contract of purchase of real estate, and to quiet title to real estate alleged to have been held by a decedent in trust for the plaintiff, must be brought within fifteen years.

NEW TRIAL.—As of Right.—Bond.—Second Application.—Error Cured.—An error in granting a new trial as of right, without a bond being tendered and approved as required by section 1064, R. S. 1881, is cured by a second order granting a new trial upon a new application and a compliance with the statute, although the first order is not formally set aside.

WITNESS.—Action Between Heirs.—In an action between a brother and sister relative to the title to land which both claim through their deceased father, a brother of the claimants and his wife, who are parties to the action but not to the issues, and disclaim any interest in the subject-matter of the controversy, are competent witnesses.

SAME.—Competency under Section 500, R. S. 1881.—Where, in an action between heirs, a witness is called by one party, who testifies as to a conversation, relating to the matters in controversy, had by him with the opposite party, prior to the decedent's death and in his absence, such opposite party becomes a competent witness, under section 500, R. S. 1881, in response to such testimony, but his right to testify is limited to the conversation in question.

EVIDENCE.—Real Estate.—Trust.—Payment of Taxes.—In an action seeking to establish a trust in land, receipts showing that the person sought to be declared a trustee paid the taxes on the land while it was in his possession, is competent.

TRIAL.—Whether by Court or Jury.—How Determined.—In determining whether a cause is triable by the court or by a jury, under the provisions of section 409, R. S. 1881, neither the prayer for relief nor the name given to the action by the pleader is controlling, but the court will look to the substantive facts pleaded.

SAME.—Rule Stated.—Where the cause of action is one that can only be enforced by invoking the equitable powers of the court, the right of trial by jury does not maintain; but if the cause of action does not depend on the equitable jurisdiction of the court, a trial by jury may be de-

118	227
121	440
122	200

118	227
120	123

118	227
131	172
131	208
132	86
132	486
133	427
133	555

118	227
134	501
135	173

118	227
158	287

118	227
164	33

118	227
166	443

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manded. *Johnson v. Taylor*, 106 Ind. 89, and *Kitts v. Willson*, 106 Ind. 147, modified.

SAME.—Real Estate.—Action by Equitable Owner to Recover.—Ejectment.—An action by a plaintiff who seeks to recover the possession of land as the equitable owner thereof, is of exclusive equitable jurisdiction, within the meaning of section 409, R. S. 1881, and triable by the court, but an ordinary action in ejectment is triable by jury.

SAME.—Mixed Actions.—Withdrawal of Cause from Jury.—Instruction to Find for Defendant.—Where, in case of the joinder of law and equity causes of action, the issues in the former are submitted to a jury, it is the duty of the court, if there is a failure of proof on the part of the plaintiff, to either withdraw the case from the jury or instruct them to find for the defendant.

From the Wabash Circuit Court.

M. H. Kidd, N. G. Hunter, W. G. Sayre, J. T. Hutchens and *A. Taylor*, for appellant.

I. D. Conner, Jr., J. S. Frazer and *W. D. Frazer*, for appellees.

BERKSHIRE, J.—The complaint, as originally filed, contained but one paragraph, but afterwards second, third and fourth paragraphs were filed. To each paragraph a demurrer was filed by the appellees John T. and Matilda Kendall. The court sustained the demurrers to the first, third and fourth paragraphs, and overruled the demurrer to the second paragraph, and proper exceptions were reserved. Afterwards an amended third paragraph and two additional paragraphs of complaint, numbered five and six, were filed. To these paragraphs the appellees Kendall demurred, and the court overruled the demurrers. An answer was then filed in seven paragraphs. To all of these paragraphs, except the first, which was the general denial, the appellant filed demurrers; the demurrers were sustained to the sixth and seventh paragraphs and overruled as to the others, and the appellant reserved his exceptions. The appellant then replied in two paragraphs. To the second paragraph the appellees Kendall demurred and the demurrer was sustained, and the appellant saved the proper exception.

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The cause then being at issue, it was submitted to a jury for trial, who afterwards returned a verdict for the appellant, and the court rendered a judgment in his favor on the 18th day of May, 1881. On the 5th day of December, 1881, the appellees Kendall moved the court for a new trial, as of right, and proved to the court that they had paid the costs that had accrued in the action, and the court set aside the judgment and granted to them a new trial. On the 28th day of March, 1882, the appellees Kendall again came before the court and moved for a new trial, as a matter of right, and tendered a bond as required by section 1064, R. S. 1881, and the court, without setting aside the former order that had been made, approved the bond and again made an order granting a new trial. On the 6th day of December, 1883, the appellees Kendall filed an amended sixth paragraph of answer, to which the appellant demurred, which demurrer was overruled, to which ruling of the court an exception was taken by the appellant. The appellant then filed a reply in two paragraphs, to the second of which the appellees Kendall demurred; the demurrer was sustained, and the proper exception reserved by the appellant. The appellant then demanded a jury trial as to the issues joined on all of the paragraphs of complaint, which the court denied, except as to the issues joined on the fifth paragraph, and the appellant saved the proper exception.

The issues joined were then submitted to a jury as to the fifth paragraph, and as to all the other paragraphs submitted to the court. After the evidence had all been introduced the court directed the jury to return a general verdict, and to answer and return therewith certain interrogatories, which the court submitted to them, and the jury did as directed, and thereupon the court found for the appellees as to all the issues in the case. The appellant then moved the court for a new trial, which motion the court overruled, and the appellant saved the proper exception, and the court rendered

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judgment for the appellees. The errors assigned are the following:

1st. The court erred in sustaining the demurrer to the first paragraph of the complaint.

2d. The court erred in overruling the demurrers to the second, third, fourth and fifth paragraphs of the answer.

3d. The court erred in granting a new trial, as of right, at the November term, 1881.

4th. The court erred in setting aside a former order and granting a new trial at the February term, 1882.

5th. The court erred in overruling the several motions of the plaintiff to vacate the orders for a new trial at the April term, 1882.

6th. The court erred in overruling the demurrer to the amended sixth paragraph of answer.

7th. The court erred in sustaining the demurrer to the second paragraph of reply to the amended sixth paragraph of answer.

8th. The court erred in overruling the motion for a new trial.

It will not be necessary for us to consider the first paragraph of the complaint, because, if it was a good paragraph, there was no available error in sustaining the demurrer thereto, as the same facts were provable under the second paragraph.

The second and third paragraphs of complaint alleged that Joel Martin was the father of the appellant; that he held certain real estate in trust for the appellant, and died leaving the trust unexecuted; that before his death he executed his last will and testament, whereby he devised said real estate to the appellee Matilda Kendall, and then follows a prayer for the execution of a deed, for possession, and to quiet title by a decree of the court.

There is some difference in the averments, but the general statement above covers substantially the causes of action stated in the two paragraphs.

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The fifth paragraph is an ordinary complaint in ejectment, and the sixth is a paragraph for the specific performance of a parol contract of purchase of real estate.

The second and fourth paragraphs of answer are separate answers by the appellee Matilda Kendall. The second paragraph alleges an adverse possession of the real estate for twenty years immediately before the bringing of this action, and the fourth paragraph alleges that the cause of action did not accrue within twenty years next before the bringing of the action. We are unable to see any infirmity in these paragraphs of answer. The third paragraph is pleaded as the separate answer of the appellee John T. Kendall. The answer avers that he is the husband of his co-appellee, Matilda Kendall, and that she is the fee simple owner of the real estate, and entitled to its possession. This paragraph of answer amounts to a denial, and is therefore a good answer.

The fifth paragraph of answer is pleaded jointly by Lewellen and Nancy Martin, two of the appellees. This paragraph avers that the title to the real estate is in Matilda Kendall, to whom it was conveyed, followed by a disclaimer of any interest in the real estate. This paragraph is a mere denial of the appellant's cause of action, and is therefore sufficient as an answer.

The sixth paragraph of answer, as amended, is a plea of the statute of limitations, jointly by the appellees Kendall. It alleges that the appellant's cause of action, as pleaded in each paragraph of his complaint except the fifth paragraph, did not accrue within fifteen years before the institution of the suit.

We are of the opinion that this is a good answer. There is no other period of limitation, as fixed by the statute, applicable to the paragraphs of the complaint to which this answer is pleaded, therefore the fifteen years' limitation, as provided in section 294, R. S. 1881, must apply. See *Nutter v. Hawkins*, 93 Ind. 260; *Caress v. Foster*, 62 Ind. 145; *Albert v. State, ex rel.*, 65 Ind. 413; *Potter v. Smith*, 36 Ind.

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231; *Eve v. Louis*, 91 Ind. 457; *Scherer v. Ingerman*, 110 Ind. 428.

The second paragraph of reply to the amended sixth paragraph of the answer was bad, and the court committed no error in sustaining the demurrer thereto.

The order granting the new trial as of right, on December 5th, 1881, was probably erroneous, as no bond was tendered and approved by the court as required by section 1064, R. S. 1881, which was then in force.

Afterwards, on the 28th day of March, the appellees having tendered a bond, as required by said section 1064, which was approved by the court, on appellees' motion, a new trial was again granted to them as of right. We are of the opinion that this cured the error, and that the new trial was properly granted. There can be no doubt that, if the court had formally set aside the first order granting a new trial, the error in granting the same would have been cured. The record would have then stood as though no action had taken place looking to a new trial, and the second order would have been proper. The only objection made to the second order is, that the court had no power to grant a new trial the second time, while the first order was in existence. The court did, substantially, that which we have indicated it had the right to do. The granting of the new trial the second time had the effect to wipe out and set aside the first order made.

We have not considered the question as to whether or not the action was one in which the appellees were entitled to a new trial as of right, for no such question is presented by the record.

We are of the opinion that the court committed no error in overruling the motions to set aside the orders vacating the judgment and granting a new trial.

The second reason assigned for a new trial is, that the court erred in admitting certain evidence given by a witness named Watson. We have examined his evidence, and particularly

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that to which objection is made. In part it consisted of a conversation with John H. Martin, the appellant. We can imagine no valid objection to this evidence ; his declarations were certainly competent evidence for the opposite party. The remainder of the evidence of the witness, to which objection is made, relates to the acts of Joel Martin, who held the legal title to the land, with reference to it, such as making improvements thereon, cultivating the land, and the like. This evidence, we think, was competent and very pertinent to the issues.

The third and sixth reasons assigned for a new trial are, that the court erred in allowing Lewellen Martin and Nancy Martin to testify on the trial. The objection, as we find it in the bill of exceptions, is as to their competency. Lewellen Martin was a brother of the appellant and of the appellee Matilda Kendall, and one of the heirs-at-law of Joel Martin, the ancestor. Nancy Martin was his wife. Joel Martin died, holding the legal title to the real estate, which by his will vested at his death in his daughter, the appellee Matilda Kendall. The appellee claims title to the land (1), because his father held it in trust for him ; and (2), because he purchased it of his father by parol contract, went into possession, made lasting and valuable improvements, and paid the purchase price. The contest is one between the appellant and the female appellee. Neither Lewellen Martin nor Nancy Martin has any interest in the subject-matter of the controversy. In their answers they disclaim any such interest, but allege that the land belongs to Matilda Kendall. It is true they are made parties to the action, but this does not disqualify them as witnesses. They are not parties to the issues, and are not, therefore, disqualified as witnesses. *Spencer v. Robbins*, 106 Ind. 580 ; *Upton v. Adams*, 27 Ind. 432 ; *Starret v. Burkhalter*, 86 Ind. 439 ; *Scherer v. Ingerman*, *supra*. The court committed no error in permitting them to testify.

The fourth reason assigned for a new trial is, that the court

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erred in admitting certain tax receipts in evidence. The objection to the receipts was that the evidence did not tend to overthrow the trust sought to be established, nor to establish an adverse title in the ancestor, Joel Martin.

We are of the opinion that evidence tending to show that, while in possession of the land, Joel Martin paid the taxes thereon, was very pertinent to the issues. The court committed no error in the admission of this evidence.

The eighth reason assigned for a new trial is, that the court erred in refusing to allow the appellant to testify that at the time he moved off of the land in question, and referred to in the testimony of Robert Watson, he did not move off of the land because his father had refused to make him a deed, but because he wanted to live on the other land and improve it; that his father had not refused to make him a deed, but had simply postponed it, and that the appellant did not abandon the land or the possession thereof; and the plaintiff further offered to show by himself as a witness that, at the time he saw John Robinson at the mill with logs, about which Robinson testified, he bought the trees of his father, Joel Martin, and that they came off of other land than the land in question.

Section 500, R. S. 1881, did not give to the appellant the right to testify generally as to his reasons for removing from the land because of the testimony given by Watson. The foregoing section gave him the right to testify to the same matter, provided the conversation was in the absence of the decedent. The court committed no error in sustaining the objection to this evidence.

One John Robinson testified as a witness and testified to a conversation with the appellant in a certain mill-yard. The witness testified that the appellant was hauling walnut logs to the mill, and that he asked appellant where he got them, and that he stated that he bought them from his father, and that they came off of the upper place, the place in controversy. There can be no doubt but that the appellant was a

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competent witness, under the statute, to testify as to the conversation with Robinson; but the offer reaches farther, it was to prove by the appellant that the logs did not come off of the land in question, but off of other land, the title to which was in his father and to which he was making no claim. If the logs were taken from different land than that in question, as claimed by the appellant, the circumstances may have been such as to have indicated a recognition by the appellant of his father's absolute ownership of the land in question, and known only to the father in his lifetime and to the appellant. And the truth may be that the logs did come off of the "upper place," a fact of which the father may have had knowledge, and to which he could testify if living.

We are of the opinion that the appellant was not a competent witness, as to the offered evidence, and that the court did right in not allowing him to testify thereto.

This leads us to the ninth, tenth and eleventh reasons assigned for a new trial, which may be considered together.

The ninth reason is, that the court erred in instructing the jury to return a verdict for the defendants upon the fifth paragraph of the complaint.

The tenth reason is, that the court refused to allow the jury to consider and return a verdict upon the whole case.

The eleventh reason is, that the court erred in requiring the jury to return a verdict upon the fifth paragraph of the complaint before the argument upon the whole case and the return of answers to questions tendered them upon the whole case.

"Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defences which, prior to said date, were of exclusive equitable jurisdiction, with causes of action or defences which, prior to said date, were designated

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as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.” Section 409, R. S. 1881.

The nature of the cause of action must be determined from the substantive facts therein pleaded, and not from the prayer for relief nor from the name given to the action by the pleader. The nature of the action and the different paragraphs of the complaint have already been stated.

In the second, third and sixth paragraphs the appellant was not seeking to recover as the holder of the legal title to the land in question, but as the equitable owner thereof.

It is not every cause of action which the pleader styles an action of ejectment or to quiet title that entitles the parties to a trial by jury; nor will the prayer for relief have any controlling influence in determining whether or not a jury may be called. The court will look to the substantial averments of the complaint or cross-complaint, as the case may be, and from the facts so averred determine whether the action is one of equitable or common law jurisdiction, and if the former, refuse a trial by jury.

If this were a case of first impression it would be free from doubt; but in view of at least two cases in this court some confusion has arisen. We refer to the cases of *Johnson v. Taylor*, 106 Ind. 89, and *Kitts v. Willson*, 106 Ind. 147.

These cases are in conflict with what is said in the case of *Spencer v. Robbins*, 106 Ind. 580. We are of the opinion that that case states the rule of practice correctly, and we therefore refer to it with approval.

We quote from the opinion: “Upon the issues made, no questions of equitable cognizance having been made, the case was triable by a jury, but as the motion of the appellant was to submit a single question relating to the execution of a deed, to a jury, it was not error to overrule it. That the action was to quiet title, nominally, does not necessarily de-

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termine that it was triable by a jury. Where the purpose of the action is primarily to establish an equitable right to land and acquire a legal title through such right by the decree of the court, as by the specific enforcement of an agreement, the reformation of a deed, or the establishment of a trust, etc., the case is of equitable cognizance."

The case of *Trittipo v. Morgan*, 99 Ind. 269, was an action to quiet title, but in that case it was the legal title that was involved, and not a mere equitable right. In cases of that class the parties are clearly entitled to a jury trial, and what is said in the opinion upon that question must be regarded as having reference to the case under consideration. We lay down the rule as follows: Whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not maintain; but if the cause of action does not depend on the equitable jurisdiction of the court, then a jury trial may be demanded. In so far as the cases of *Johnson v. Taylor*, *supra*, and *Kitts v. Willson*, *supra*, seem to be in conflict with the rule as here stated, they are modified and limited.

The causes of action embraced in the second, third and sixth paragraphs of the complaint are of exclusive equitable jurisdiction within the meaning of section 409, *supra*.

The fifth paragraph of complaint being in ejectment, the court did right in submitting the issues joined thereon to a jury; but when the evidence had all been introduced, as there was an entire failure of proof to support the issues on the appellant's part, it became and was the duty of the court either to take the case from the jury or instruct them to find for the appellees. *Gaff v. Greer*, 88 Ind. 122.

We have not examined the other instructions, because the appellant could not be injured by them, his case having failed before the jury for want of evidence.

The court having the whole case before it, it became and was its province to make a finding upon the evidence intro-

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duced, and to render judgment accordingly. This was done. We find no error in the record.

The judgment is affirmed, with costs.

MITCHELL, J., took no part in this decision.

Filed April 6, 1889.

No. 13,614.

MONKS v. MONKS.

SLANDER.—*Charging that One has Loathsome Disorder.*—It is actionable slander to maliciously speak and publish of another that he has contracted and is suffering from a loathsome disorder.

From the Randolph Circuit Court.

W. A. Thompson, A. O. Marsh, J. W. Thompson, E. L. Watson and J. E. Watson, for appellant.

T. F. Colgrove, L. A. Canada and F. Garrett, for appellee.

ELLIOTT, C. J.—We are of the opinion that taking the slanderous words set forth in the complaint in connection with the circumstances under which they are alleged to have been spoken, they relate to what was then present and not merely to what was past. We think that the complaint charges that the defendant maliciously slandered the plaintiff by speaking and publishing of him that he had contracted a loathsome disorder, from the effects of which he was still suffering. We are also of the opinion that counsel for the appellant are in error in treating the words as separate sets. We do not so understand or construe the pleading.

Judgment affirmed.

Filed April 4, 1889.

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No. 13,218.

MCDANIEL ET AL. v. THE STATE, EX REL. MCHUGH.

MORTGAGED CHATTELS.—Sale on Execution.—Duty of Constable.—Notice of Lien.—It is the duty of a constable, under section 722, R. S. 1881, to ascertain from the records whether property levied upon by him by virtue of an execution is mortgaged; the mortgagee is not required to give him further notice of the lien.

SAME.—Duty of Officer to Retain Possession.—Liability on Bond.—A constable must retain possession of mortgaged property sold by him until the purchaser has complied with the conditions of the mortgage, and for a breach of this duty he is liable on his bond.

SAME.—Validity of Lien.—Disputes between Purchaser and Lien-Holder.—The duty of the constable is discharged by retaining possession; he can not compel a compliance with the conditions of the mortgage, and has nothing to do with the validity of the lien or disputes that may arise between the purchaser and lien-holder.

SAME.—Failure of Mortgagee to Set up Title at Sale.—A mortgagee of chattels which have been levied upon by a constable in satisfaction of an execution, does not waive any right of action against the officer for a breach of duty by failing to appear at the sale and set up title.

SAME.—Responsibility of Purchaser.—It is no defence to an action upon a constable's bond for delivering property without requiring the purchaser to comply with the terms of the mortgage, that such purchaser is a responsible person, residing within the county.

SAME.—Answer.—Nominal Damages.—An answer that the mortgaged property remains in the custody of the purchaser, within the county, and still subject to the lien, and that the mortgage may be enforced as well as before the sale, is not good as a complete defence, as the defendants are at least liable for nominal damages.

SAME.—When Mortgagee Bound to Pursue Property.—Measure of Damages.—If mortgaged property, after it has been sold on execution and delivered to the purchaser, is still in such a situation and condition that the mortgagee may pursue it and subject it to his mortgage, he is bound to do so; and the officer, for his breach of duty in delivering the property without requiring a compliance with the mortgage, will be liable only for such damages as the mortgagee has actually sustained.

From the Montgomery Circuit Court.

L. J. Coppage, for appellants.

D. E. Williamson, A. Daggy, B. F. Ristine, T. H. Ristine
and *H. H. Ristine*, for appellee.

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OLDS, J.—This is an action by the State, on relation of Ella McHugh, appellee, against the appellants upon a constable's bond. The complaint alleges, in substance, that, in 1882, appellant Albert G. McDaniel was duly elected as constable in and for the township of Clark, in Montgomery county, and was duly commissioned and qualified, and, on the 10th day of April, 1882, executed his bond, as such constable, to the State of Indiana, with appellants Ashley and Kyle as sureties, in the penal sum of \$1,500, a copy of which bond is filed with the complaint and made a part thereof, marked exhibit "A"; that the bond is conditioned, amongst other things, that the said McDaniel will duly, honestly and faithfully discharge and perform all and singular his duties as such constable during his continuance in office, in all things agreeable to law; that, on the 3d day of October, 1883, one Michael W. Lane executed to the relatrix his note for the sum of \$1,500, due and payable one year after the date thereof, with six per cent. interest and attorney's fees, and at the same time said Lane executed to the relatrix his chattel mortgage to secure the payment of said note, which chattel mortgage was duly acknowledged and recorded, within ten days after its execution, in the recorder's office of Montgomery county, where said mortgagor then resided; that the following property was set out and described in said mortgage, to wit: Sixty-five acres of corn standing and growing in the field on the farm of said Lane, in said Montgomery county; seven hundred bushels of corn in the crib on the said farm of Lane; two black mares, one seven and the other eight years old; one light-brown colt, three years old; that said property was to remain in the possession of the mortgagor until said note became due, or if the property should be levied upon by virtue of an execution from any court, the mortgagee should have the right to take immediate and unconditional possession of the same for her own use; that afterwards, to wit, on the 8th day of October, 1883, one Scott commenced suit against said Michael W.

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Lane before a justice of the peace of said Clark township, on a note and account against said Lane, and filed his affidavit and bond for an attachment; that one Rapp also filed his complaint, affidavit and bond for attachment with said justice, and thereupon said justice duly issued a writ of attachment and delivered the same to said McDaniel, as such constable, and said McDaniel, as such constable, levied the writ of attachment on the said property described in said chattel mortgage; that, on the 15th day of October, 1883, said causes came on for trial before said justice of the peace, and then and there said justice rendered a judgment in favor of Scott against Lane for \$145.65 and costs, also in favor of Rapp against Lane for \$192.50 and costs taxed at \$17, and accruing costs, and ordered said attached property to be sold by said constable, the same being said mortgaged property; that afterwards said justice issued an order for the sale of said attached property, commanding the same to be sold as upon execution and delivered the same to said McDaniel, as such constable; that, on the 10th day of November, 1883, said McDaniel, as said constable, sold said mortgaged property to divers persons, and then and there delivered the same to said several purchasers at said sale without requiring them to perform and comply with the terms of said chattel mortgage, but then and there unlawfully, negligently and carelessly, and without any regard to the conditions of his bond, and in breach thereof, and disregarding his duty as such constable, then and there diverted the same from the security and payment of said note so executed by said Lane to relatrix, to her damage in the sum of \$1,500; that an action has accrued to the plaintiff against said defendant for the breach of said bond in this: That said constable failed, neglected and refused to require said purchasers of said mortgaged property at said constable's sale to comply with the conditions of said mortgage, and without authority of law delivered said attached property described in said mortgage to the several

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purchasers at said sale, and then and thereby diverted the same from the payment of said mortgage debt. Prayer for judgment.

There was a demurrer filed by the defendants to the complaint, for want of facts, which was overruled by the court, and to which ruling of the court defendants excepted. This is the first error assigned and argued.

Counsel for appellants contend that section 722, R. S. 1881, was not intended to and does not impose any additional duties on the constable making sale of mortgaged or pledged property; that there was a question as to whether the condition in a mortgage permitting the mortgagee to take immediate and unconditional possession in case the property should be levied upon, vested the property in the mortgagee absolutely, upon the happening of that contingency, or whether the title still remained in the mortgagor; and that the statute was passed to settle such mooted question and to prevent the debtor, in this manner, from giving his mortgagee an absolute title, and to enable the officer to sell the property on execution, and upon such sale to give to the purchaser just such title as the debtor had, viz., the title to the property, divested of the lien of the mortgage, upon complying with the terms and conditions of the same; that it was never intended by said statute to impose upon the constable or sheriff the duty of enforcing a compliance with the conditions of the mortgage; that such officer has nothing to do with liens on property in his possession by virtue of a levy, except such liens as are brought to his knowledge by some means recognized by the law; that section 736, R. S. 1881, provides that "It shall not be the duty of the sheriff or appraisers to ascertain the amount of liens and incumbrances." It is further urged that the requiring and enforcing of a compliance with the conditions of a pledge, or a mortgage, necessarily involves the exercise of judicial functions in ascertaining the existence of the lien, its validity, priority, conditions and amount, and many other things of like character, and that

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this court has held that judicial powers can not be vested by the Legislature in an administrative or executive officer. It certainly required a great deal of ingenuity on the part of counsel to conceive all of the objections urged to this section of the statute, but we do not regard any of them as tenable.

It is true, as stated by counsel, that the duties of constables are prescribed by statute, and said section 722 imposes upon a constable the duty of ascertaining from the record whether property levied upon by him, by virtue of an execution, has a mortgage upon it, and if it has, it makes it his duty, on selling such property, to retain possession of the same after the sale, and not deliver the same to the purchaser, until the conditions of the mortgage are complied with. It is not required of him to compel the purchaser to comply with the conditions of the mortgage, nor to ascertain and determine any disputes between the lien-holder and the purchaser, nor to inquire into the validity of the lien. If any disputes arise between the lien-holder and the purchaser, such disputes are to be settled between them by proper proceedings in court, the constable retaining possession of the property until such disputes are determined. If the purchaser disputes the amount of the lien, as it appears upon its face, or the validity of it, and refuses to pay and claims the property, he has his remedy by proper proceedings in court.

Kindred questions to those suggested by counsel frequently arise in the discharge of the duties of a constable. As well might it be said that the Legislature could not impose upon a constable the duty of making a levy upon the property of an execution debtor sufficient to satisfy the execution, for in doing so he would have to determine the ownership of the property and its value.

In answer to the suggestion in regard to section 736, R. S. 1881, we may say that sections 722 and 736 must be construed together, and if in conflict, section 722 would constitute an exception to the rule that it shall not be the duty of an of-

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ficer to ascertain the amount of the liens or encumbrances on property levied upon by virtue of an execution.

Section 737 provides that "The sheriff shall furnish the appraisers a schedule of the property levied on, with the encumbrances made known to him." Made known to him how? The answer is a plain one. By the list furnished as provided that it may be in section 736, viz., "by either party," and by the record of the chattel mortgages, which he is bound to take notice of, under the provisions of section 722.

By section 737 it is provided that the appraisers shall "fix and set down opposite to each tract, lot, or parcel of real estate, and of the several articles of personal property, the cash value, deducting liens and encumbrances." The same constitutional objection urged by counsel would apply to this section, prescribing the duties of appraisers, as by this section it is made the duty of the appraisers to deduct the liens and encumbrances. With the same force it may be suggested that they act judicially, and have to determine the validity of and place a construction upon the writing, and determine its conditions and the amount due.

We do not think the section invalid for any of the reasons urged. It is not the first time this section of the statute has been considered by this court. It has been repeatedly considered, and the officer held liable upon his bond for turning over the property to the purchaser without the purchaser having first complied with the conditions of the mortgage. See the case of *Slifer v. State, ex rel.*, 114 Ind. 291, and authorities there cited.

It is further urged that it does not appear from the complaint but that there was sufficient property included in the mortgage, in addition to the amount sold, to satisfy the mortgage debt. After describing the mortgaged property, the allegations of the complaint are that the constable levied upon the mortgaged property, and afterwards sold it. It affirmatively appears that he levied upon and sold all the mortgaged property.

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The next errors assigned are the sustaining of the demurrers to the second, third and fifth paragraphs of answer.

The second paragraph alleges that the appellee relatrix was notified of the levy, and knew the constable had possession of the property and had levied upon it as the property of Lane, and her attorney and agent was present at the trial of the attachment proceedings, and when the property was ordered sold; that notice was given of the sale; that she was not present at the sale, but had notice of it and might have attended the sale, and that she took no steps to assert her title to the property. The demurrer was properly sustained.

The constable had the right to take the property, by virtue of his writ, as the property of Lane; the justice had the right to order it sold. The relatrix was not a party to the suit; she was not called upon to set up title. She is not complaining now of any of these things; what she complains of is, that the constable, after the sale, turned the property over to the several purchasers without their having complied with the conditions of her mortgage.

The third and fifth paragraphs allege the levy and sale, that the constable had no notice of the lien, that relatrix never furnished him any schedule of it; that she was not present at the sale although she resided but twenty miles distant; that after the constable sold the property he did nothing further with it, that he did not turn it over to the purchasers, but left it in the possession of the same person who had possession at the time of the levy; that if the purchasers took the property they did so on their own account, without his interference; that it was sold to responsible persons residing within Montgomery county, and who are still residents of said county, and that if any of the property has been used or destroyed the purchasers are responsible.

There was no error in sustaining demurrers to these paragraphs. It is no defence to the action that the constable did not know of the lien. The complaint alleges that the mortgage was duly recorded within ten days from the date of its

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execution. That was all the notice the mortgagee was required to give. The record was notice to every person dealing with the property, and the constable was chargeable with notice. Neither was it any defence that the persons to whom the property was sold and delivered were responsible, and residents of Montgomery county.

The fifth paragraph is pleaded as an answer as to all but nominal damages, but it does not go far enough to show affirmatively that all the property still remains in the possession of the person having possession of it at the time of the levy, nor that it still remains substantially as it was at the time of the levy, except having been transferred to the custody of the purchasers, and that it can be reached by the mortgagee.

From all that appears in this paragraph the purchasers may have taken and converted the property.

The third paragraph substantially alleges that the property still remains in the custody of the purchasers, within the county, and is subject to the lien of the mortgage the same as before the sale, so that the mortgagee can as well enforce her lien now as before the sale, and has sustained no substantial injury. But the third paragraph is pleaded as a complete defence to the cause of action, and upon that theory it is not good, for the reason that on such a state of facts defendants would be liable for at least nominal damages.

The only allegations in these answers that would make them good as a complete answer to the complaint are the allegations which amount to a denial of the delivery of the property to the purchasers. But they are not pleaded upon that theory, and, if good at all, they must be good on the theory upon which they are pleaded. There was a general denial pleaded, and hence there was no error in sustaining demurrers to these paragraphs.

We will next consider the questions presented on the instructions given.

Exceptions were reserved to the several instructions of the

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court. We do not deem it necessary to consider each of the instructions separately, but the charge, taken as a whole, is manifestly erroneous.

The third instruction is as follows: "It is true that the property still remained subject to the mortgage lien at the time of and after such sale, if in existence, as a sale does not divest the lien; still the plaintiff is entitled to recover the full value of the property sold, when the constable has sold mortgaged property without requiring the conditions of the mortgage to be complied with, and the purchaser has taken possession of the same; and in this regard it makes no difference that the property is not damaged, and is still in a situation and condition that the mortgagee might pursue the same; there is no obligation resting on the mortgagee to so pursue the said property into the hands of a purchaser in possession, but he may recover the full value thereof in a suit on the bond of said officer who sold such property."

This instruction did not properly state the law. If the property, after the sale, and at the time of the commencement of this suit, was not damaged, and was still in a situation and condition that the mortgagee might pursue the same as well after as before the sale, he would be bound to do so, and the officer would only be liable for such damages as the mortgagee actually sustained by reason of the neglect of duty on the part of the officer.

The liability on the part of an officer who levies upon and sells mortgaged goods, and turns the same over to the purchaser, or allows the same to be taken by the purchaser, with his consent, is the actual damage the mortgagee sustains. If the goods are converted by the officer or the purchaser, or such use is made of them as that the mortgagee is deprived of the benefit of the property or his lien, the liability is an amount not to exceed the value of the property or the mortgage debt, if the property is of greater value than the debt. This is the rule as laid down in *Slifer v. State, ex rel., supra*, and we think it the proper one in such cases.

It is manifest from the record and the charge of the court that the case was tried on the theory of the law enunciated in the third instruction, which was erroneous. For the error of the court in giving this instruction the judgment must be reversed.

The other errors discussed may not arise on another trial, and we do not consider them.

Judgment reversed, at costs of appellee, and for further proceedings not inconsistent with this opinion.

Filed April 4, 1889.

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125	134
118	248
133	110

No. 12,328.

THE WESTERN UNION TELEGRAPH COMPANY v. YOPST.

TELEGRAPH COMPANY.—*Transmission of Message.*—*Penalty.*—*Contract.*—A contract is essential to create a duty, and in order that one may recover the statutory penalty for a breach of duty in the transmission of a telegram, a valid contract must be shown, as the contract is the foundation of the action.

SAME.—*Transmission on Sunday.*—*Necessity.*—A contract by a telegraph company to transmit a message on Sunday is valid or invalid, owing to the reasonable necessity, or the want of it, for the transmission of the message on that day. For evidence held not sufficient to show a necessity, see opinion.

SAME.—*Nature of Business.*—In determining whether an act is, or is not, one of necessity, it is proper to give just effect to the nature of the business in which the person who does it is engaged.

SAME.—*What Messages May be Sent.*—A telegraph company may not transact ordinary business on Sunday, but it may keep open its offices for the receipt and transmission of messages where a reasonable necessity exists, such as those designed to relieve suffering, avert harm or prevent serious loss.

SAME.—*Complaint.*—*Notice of Necessity.*—Where a complaint against a tel-

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telegraph company to recover a statutory penalty shows that the contract was made on Sunday, the complaint is bad unless the contract is shown to be valid because of the existence of a necessity for the making of the contract on that day, and that the defendant knew of the necessity.

SAME.—*How Notice May be Shown.*—Where the contents of the telegram itself are not sufficient to charge the telegraph company with notice of the necessity for its transmission, the plaintiff must show knowledge by extrinsic facts. A message reading, "Bring forty dollars if you want record," does not show necessity.

SAME.—*Prepayment of Charges.*—Where the agent of a telegraph company declines to receive compensation for transmitting a message, and requests the sender to allow the expense to be paid by the receiver, the company can not escape liability on the ground that compensation was not prepaid.

SAME.—*Notice of Default.—Failure to Give.*—Where a contract is essential to the existence of a duty, and it contains a stipulation requiring the plaintiff to give a written notice of a default, the failure to give the notice will defeat an action to recover a penalty attached to a violation of the duty created by the contract.

SAME.—*When Notice or Demand not Necessary.*—A provision in a contract between a telegraph company and the sender of a message, that "the company will not be liable for damages in any case where the claim for damages is not presented in writing within sixty days after sending the message," applies only to cases where the message is sent, and if there is a failure to transmit, no written notice or demand is required to fix the company's liability.

SAME.—*Evidence.—Declarations of Agent.*—An objection to the admission of the declarations of an agent on the ground that "no other person can bind the company except the one with whom the business is transacted," presents no question as to the nature and scope of the agent's authority, and is not well taken as a general proposition.

From the Cass Circuit Court.

J. R. Coffroth, T. A. Stuart, D. D. Dykeman, W. T. Wilson
and *G. C. Taber*, for appellant.

T. J. Tuley and *D. C. Justice*, for appellee.

ELLIOTT, C. J.—The complaint of the appellee is based upon the statute defining the duties of telegraph companies, and prescribing a penalty for a breach of duty. This penalty the appellee seeks to recover.

The principal objection urged against the complaint is that the telegram was received on Sunday, and that as it

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does not appear that there was any necessity for receiving or transmitting it on that day, the contract which underlies the duty is invalid, and hence no recovery can be adjudged. It is true, as counsel assert, that a contract is essential to create a duty. *Rogers v. Western U. Tel. Co.*, 78 Ind. 169; *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526; *Western U. Tel. Co. v. Wilson*, 108 Ind. 308. The complaint must be held insufficient, unless there are facts pleaded establishing a valid contract. Ordinarily a contract made on Sunday is invalid. *Rogers v. Western U. Tel. Co.*, *supra*, and cases cited; *Western U. Tel. Co. v. Wilson*, *supra*. If, however, there is a necessity shown for receiving or transmitting a message on Sunday, then the contract is valid, and will constitute a sufficient foundation for the duty enjoined upon telegraph companies.

A contract to transmit a message regarding ordinary business which can be transacted as well on any other day as on Sunday, is not within the exception to the general rule that ordinary business shall not be transacted on Sunday; but there may be facts which will impress it with the character of a work of necessity, and take the transaction out of the general rule. An emergency requiring immediate action to prevent serious loss or injury may occur in a person's usual vocation which would make the work of delivering and transmitting a telegraphic message one of necessity. This is the principle asserted in our cases, which hold that work or business, within the scope of a person's usual vocation, may be performed or transacted on Sunday when necessary to preserve property or prevent serious loss. *Yonoski v. State*, 79 Ind. 393; *Turner v. State*, 67 Ind. 595; *Edgerton v. State*, 67 Ind. 588; *Wilkinson v. State*, 59 Ind. 416; *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 Ind. 189. The necessity which will excuse one who performs work or does business on Sunday is not required to be absolute or imperious, but it must, nevertheless, be a reasonable one. It is not possible to give a definition to the word "necessity" that

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will fit every case, for what will be just under the facts of one case may be unjust under the facts of another. The statute is intended to secure a quiet Sabbath, and make it a day of rest, on which men shall not be compelled to perform ordinary labor, or permitted to conduct ordinary business ; but it is not its purpose to prohibit the performance of work where there is a necessity for its performance in the particular instance, not existing in the usual course of the business of the person who does the act. It punishes persons who work or do business on Sunday, in order to restrain them from transacting business in the ordinary course, but it does not mean to punish a person who does an act on Sunday because the act is necessary to prevent serious loss or injury. Telegraph companies, we judicially know, are permitted to keep open their offices, for the transmission of messages, on Sunday, because there are emergencies, involving sometimes life and sometimes great public and private interests, requiring that messages be transmitted on that day. In many instances it is, as every one knows, of the highest importance and most serious moment that messages should be received and transmitted on Sunday. In determining whether an act is or is not one of necessity, it is proper to give just effect to the nature of the business in which the person who does it is engaged. We must do so here. We know that in many instances the transmission of a message on Sunday may be necessary to prevent great loss, and even to save life ; and knowing this we can not do otherwise than hold that the business of telegraphing can not be brought under the same rules as that of a merchant, farmer or mechanic. The merchant who keeps open his shop for business and custom on Sunday the same as on a secular day, by that act violates the law, although he would not necessarily violate it if, upon request, he should sell some article needed at once to prevent serious loss or suffering. The case of a telegraph company is different. It may keep open its offices for the receipt and transmission of messages, where there is a reasonable neces-

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sity for transmitting them on that day, although it has no right on that day to do a general business. Messages that may as well be sent on any other day as on Sunday, without causing loss, harm or suffering, it is prohibited from receiving on that day ; but messages designed to relieve suffering, avert harm, and prevent serious loss, it may on that day receive and transmit. The view we have taken is not only supported by our own decisions and by those of many other courts, but it is no more than a development of a principle declared by a court which has gone as far as any in the land in enforcing the statutes against Sabbath-breaking. In *Flagg v. Inhabitants, etc.*, 4 Cush. 243, that court said: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity ; but a moral fitness or propriety in the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute." It is, as we believe, morally fit and proper that a telegraph company should receive and transmit messages on Sunday, where it is necessary to prevent serious loss. What was said by the court in *McGatrick v. Wason*, 4 Ohio St. 566, is peculiarly applicable here: "Nor will it do," said the court, "to limit the word 'necessity' to those cases of danger to life, health or property, which are beyond human foresight or control. On the contrary, the necessity may grow out of, or indeed be incident to a particular trade or calling, and yet be a case of necessity within the meaning of the act."

We collect and cite a few of the many cases sustaining our conclusion : *Hennersdorf v. State*, 25 Tex. App. 597 ; *Ashbrandt v. State*, 25 Tex. App. 599 ; *Dixon v. State*, 76 Ala. 89 ; *Parmalee v. Wilks*, 22 Barb. 539 ; *Murray v. Commonwealth*, 24 Pa. St. 270.

As the appellee's complaint shows that the contract was made on Sunday, the burden is upon him to show that a necessity existed for making the contract on that day. *Troewert v. Decker*, 51 Wis. 46. This is so, because he seeks to en-

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force a penalty inflicted by way of punishment and not given by way of compensation. It is essential to his cause of action that he should show a valid contract. The case is not governed by *Heavenridge v. Mondy*, 34 Ind. 28, for here the action is to recover a statutory penalty, and the plaintiff must show an effective contract in order to bring himself within the terms of the statute on which alone his action is based. Here, too, the act contracted for was within the usual vocation of the telegraph company, and as it was done on Sunday and the contract for its performance made on that day, the contract was *prima facie* invalid. Principle and authority require that, in order to enable the plaintiff to recover a statutory penalty for an act done on Sunday, he should show that the defendant was guilty of a wrong, and to accomplish this it is incumbent upon him to show that the contract was legal. One who procures another to make a contract forbidden by law, ought not to be permitted to avail himself of the contract to enforce a statutory penalty for a breach of duty springing from the contract, unless he shows that there was a necessity for making the contract, and so brings his case within the exception created by the statute.

Where a plaintiff undertakes to plead and avoid a defence, his complaint will be bad if he does not avoid the defence he assumes to state. If he states a valid defence without avoiding it, he destroys his cause of action. He is not bound to anticipate a defence, but if he undertakes to do so and goes no further than to state a defence, he nullifies his complaint. *Locke v. Catlett*, 96 Ind. 291, 294; *Keepfer v. Force*, 86 Ind. 81; *Reynolds v. Copeland*, 71 Ind. 422.

To avoid the defence which the statute forbidding the making of contracts on Sunday creates, it was incumbent upon the plaintiff, after having alleged that the contract was made on Sunday, to plead facts showing that there was a reasonable necessity for making the contract on that day, and that the defendant knew of this necessity. If a defendant enters into a contract prohibited by law, he can not be

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compelled to perform it, or to respond in damages to the person with whom he contracts. An illegal contract can not, as between the immediate parties, be the source of a legal right. Where the only road to a recovery is by way of an illegal contract, the courts will not assist the parties to the contract in travelling it, but where there can be a recovery without the aid of the illegal contract, a recovery may be adjudged. *Pape v. Wright*, 116 Ind. 502; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566. Here, there can be no recovery if the contract was illegal, since the entire right of the plaintiff is founded on the contract, and without it the asserted right can have no legal existence. *Western Union Tel. Co. v. Wilson, supra*.

The plaintiff in such a case as this may show a reasonable necessity and notice of that fact from the contents of the telegram itself, or he may show knowledge by extrinsic facts. There may, we say, be cases where the telegram would impart knowledge, but this is not one of them, for there is nothing on the face of the telegram conveying information that there was any necessity for receiving or transmitting it on Sunday; on the contrary, so far as the words of the telegram show, it was an ordinary message that might have been sent on any secular day. If there is any reasonable necessity shown, it is shown by the extrinsic facts averred and not by the words of the telegram, for the language of the telegram is: "Bring forty dollars if you want record."

The demurrer to the complaint is not to each paragraph, but it is addressed to the entire pleading, so that if there is one good paragraph there was no error in overruling the demurrer. We are, therefore, only required to ascertain and decide whether any one of the paragraphs of the complaint is good. As we have said, the contract which lies at the foundation of the action was, as the complaint shows, made on Sunday, and as it was made on that day the complaint is bad, unless it shows two essential facts in avoidance of the statutory condemnation of Sunday contracts; these essential

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facts are a reasonable necessity for sending the message, and notice to the company of that necessity. Our opinion is that one of the paragraphs does show a reasonable necessity for receiving and transmitting the message on Sunday, and that the defendant had notice of this fact. Although the allegations upon this point are very vague and indefinite, we adjudge them sufficient on demurrer, since the remedy for uncertainty is by motion, and not by demurrer.

Where the agent of a telegraph company declines to receive compensation for transmitting a message, and requests the sender to allow the expense to be paid by the person to whom the message is sent, the company can not escape liability on the ground that compensation was not paid at the time the message was delivered to the agent by the sender. It is a familiar rule that a party can not escape liability if he, by his own act, makes a tender unnecessary or unavailing. This was the effect of the act of the appellant's agent.

The sixth paragraph of the appellant's answer sets forth the written contract, under the terms of which the message was received. As there was a written contract, it must be regarded as containing the whole agreement of the parties. Both parties are, of course, bound to do what that contract requires. A failure on the part of one to comply with its terms destroys his right to enforce it against the other, or to derive any statutory rights from it. The telegraph company undertook to transmit the message only upon the consideration that the plaintiff should perform his part of the contract. It was bound to do what it agreed, and so was the plaintiff. If the plaintiff failed to do what he undertook to do, he had no rights under the contract, and, as the cases we have referred to hold, if he had no rights under the contract he can not recover the statutory penalty. To invest him with the right to recover the penalty he must have a valid contract, and must do what he agreed in that contract to do. The contract is not simply blended with his cause of action, but it constitutes its foundation. Where, as here, a duty ex-

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ists only by virtue of a contract, a penalty affixed to a breach of that duty can not be recovered unless the party seeking a recovery shows that he has done what the contract requires, for, if he has not, he has no rights under the contract, and in the absence of such rights he can not enforce the statutory penalty. It seems quite clear to us, that, where a right to a statutory penalty depends upon the fact that a contract was entered into creating the duty the breach of which gives a right of action, no right of action can exist unless the plaintiff has himself performed his part of the contract. If it were otherwise, then a party might recover for a breach of duty created by the contract, and yet not be able to enforce the contract. It would be strange, indeed, if a party could collect a statutory penalty for a breach of duty that without the contract could not exist, and yet have no right to maintain an action on the contract, which was the source from which the duty sprung.

It is held in many cases, and none to the contrary have been cited, that a contract requiring notice can not be enforced unless the notice provided for has been given. *Young v. Western U. Tel. Co.*, 65 N. Y. 163; *Heimann v. Western U. Tel. Co.*, 57 Wis. 562; *Cole v. Western U. Tel. Co.*, 33 Minn. 227; *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 83; *Western U. Tel. Co. v. McKinney*, 2 Texas Ct. of App. (Willson) sec. 644. In the case last named it was said: "This stipulation was a condition precedent to the appellee's right to recover. * * Until he had performed it he had no cause of action." But our own decisions settle the general question against the appellee. *Western U. Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713); *Western U. Tel. Co. v. Meredith*, 95 Ind. 93; *Western U. Tel. Co. v. Wilson*, *supra*. We conclude that where a contract is essential to the existence of a duty, and it contains a stipulation requiring the plaintiff to give a written notice of a default on the part of the telegraph company, the failure to give the notice required by the con-

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tract will defeat an action to recover the penalty attached to a violation of the duty created by the contract.

In holding that the written notice is required, we have not disposed of the questions presented by the answer. Another material question remains, and that is this: Does the contract provide for a written demand in cases where there is no transmission of the message? The provision in the contract is this: "The company will not be liable for damages in any case where the claim for damages is not presented in writing within sixty days after sending the message." The time fixed by the contract is sixty days from the time of sending the message. The contract thus definitely names the time, and in doing this specifies the cases in which the limitation it designates shall apply. By the words of the contract the cases to which the limitation applies are those in which the message is sent. If this be true, and we can not perceive why it is not, then where there is no transmission of the message, but a total failure to transmit, there is no limitation fixed by the contract, and no written notice or demand is required to fix the liability of the company. It is evident from the words of the contract themselves that it is only in cases where the message is sent or transmitted that a written demand is required. There is no valid reason why the words of the contract should be extended in favor of the company to cases which they do not embrace. The limitation is for the benefit of the company and is of its own creation. It has no right, therefore, to ask that the contract be extended for its own benefit beyond the letter of the instrument. Nor is there any ambiguity in the language employed, for it clearly designates the cases in which the limitation shall apply. The company is invested with comprehensive powers and rights, and is by law charged with duties to the public in consideration of the rights and franchises granted to it. It is impressed with a public character, and its duties are similar in many respects to those of a common carrier. *Hockett*

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v. *State*, 105 Ind. 250 (55 Am. R. 201). It ought not, therefore, to be permitted to successfully insist that a limitation of its own creation, and established for its own benefit, should be extended beyond the words creating the limitation.

In *Western U. Tel. Co. v. Meredith, supra*, there was a failure to transmit and to deliver; here there was an utter failure to transmit, so that the decision in that case does not apply. There was here no effort made to transmit the message. The point as it is here presented did not arise in that case, and it is, therefore, not authoritative. If the company had sent the message but failed to deliver it, the decision referred to would be relevant, but as it did not send the message over the wires the limitation in the contract does not apply, as it is only of force in cases where the message is transmitted, or, in the language of the contract, from the time of "sending the message."

The breach of duty occurs, as in favor of a plaintiff, when a valid contract is made and there is a failure to do what the contract and the statute require. *Carnahan v. Western U. Tel. Co.*, 89 Ind. 526. But the limitation imposed by the corporation does not then take effect, for, to repeat what we have said, that limitation takes effect from the time of sending the message, and if no message is sent no limitation takes effect. The limitation, as in favor of the company, is only effective when the company so far does its duty as to transmit the message delivered to it under a valid contract. The rights of the company under the limitation depend entirely upon the contract between the company and the sender of the message. In a proper case it constitutes a defence, but only in such a case. The rights of the sender do not depend upon the limitation, but they may be defeated by it in a case falling within the terms of the contract. In favor of the sender the contract requires both a transmission over the wires and a delivery of the message. *Western U. Tel. Co. v. Lindley*, 62 Ind. 371. But the limitation benefits the corporation only when it has in part done its duty; for no

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advantage arises from the limitation in case there is a total failure or refusal to do what the law requires.

We need not decide whether the replies to this answer are, or are not, sufficient, for, conceding that they are bad, no benefit will accrue to the appellant; for a bad reply is good enough for a bad answer.

Objections to testimony must be specific. General objections are unavailing. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196. Only objections properly made in the trial court can be considered on appeal.

Under these long settled and familiar rules the only specific objection to the testimony of the plaintiff as to declarations made by Dusener, the agent of the appellant, is this: "No other person can bind the company except the one with whom the business is transacted at the time." This objection, as stated, is not valid. If Dusener was the general agent of the corporation, then his declarations would bind it, whether made at the time the contract was entered into or not. The objection does not present the question as to the nature and scope of the agent's authority, but simply challenges his authority to bind the corporation by declarations not made when the contract was entered into. There may be cases where a foreign corporation may be bound by the declarations and acts of an agent in charge of its business at a town or city, and we can not say that this is not such a case. *Commercial, etc., Co., v. State, ex rel.*, 113 Ind. 331. But, however this may be, the objection as stated simply requires us to decide whether any agent, other than the one who made the contract, can bind the corporation by declarations made subsequent to the contract, and as it is certain some agent may, indeed must, have authority to so bind the corporation—since a corporation acts only by agents—the objection is not well taken.

We must, of course, decide the case upon the uncontradicted evidence adduced by the appellee, since, as we have again and again decided, we are bound to act upon the evi-

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dence which the court or jury deemed trustworthy. The question, therefore, is this: Is there evidence directly proving, or from which it may be justly inferred, that the work done at the instance of the appellee was one of reasonable necessity? If it was simply a work of convenience, the finding can not stand, for matters of convenience can not take a case out of the statute. The evidence of the appellee shows that he was employed, as a stenographer, to report and transcribe the evidence given on the trial of the case of *Atkinson v. The Great Southern Railway Company*, and T. C. Annabel was one of the attorneys in the case. The motion for a new trial was overruled on the 20th day of January, 1883, and sixty days' time given in which to file a bill of exceptions. In the following month the appellee was ordered to prepare a long-hand report of the evidence. This work he completed on the day the telegram was deposited in the appellant's office, which was on the 18th day of March. The appellee says in his testimony that from the time the transcript was ordered until it was completed, "he put in every moment of time he could." Annabel, the attorney, lived at Goodland, and the appellee at Logansport. The judge, by whom the bill of exceptions was to be signed, was holding court at Lafayette. This is the evidence most favorable to the appellee, and our judgment is that it fails to show a reasonable necessity for sending the telegram on Sunday. There is, upon this point, an utter failure of evidence, for the utmost effect that can be assigned the testimony is, that the sending of the message was a matter, not of necessity, but of convenience. For anything that appears, the trains may have been so frequent as to have enabled the appellee to have readily accomplished all he desired by sending his message on Monday.

It does, in fact, appear that the attorney did get the report in time to go to Lafayette and have his bill signed. It does not appear that there was any reason why the message was not sent on Saturday, and the clear inference is that on

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that day the appellee knew when the report would be completed. The burden is on the appellee to establish an exception to the general rule prescribed by the statute, and this he can not do by proving facts showing simply a matter of convenience. His proof, at all events, falls far short of establishing a case of necessity. Our conclusion upon this point is fully supported by authority. *Mueller v. State*, 76 Ind. 310; *Shaw v. Williams*, 87 Ind. 158; *Johnson v. Irasburgh*, 47 Vt. 28; *McGrath v. Merwin*, 112 Mass. 467; *Connolly v. City of Boston*, 117 Mass. 64.

Under the rule laid down in *Mueller v. State*, *supra*, the appellee ought to have done on Saturday what he did on Sunday.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial.

Filed Feb. 12, 1889; petition for a rehearing overruled April 5, 1889.

 No. 13,412.

LAW v. JOHNSTON.

ASSESSMENT.—Street Improvement.—Notice.—Due Process of Law.—Constitutional Law.—Where a street improvement assessment can only be enforced by proceedings in court, after due notice to the property owner, the city charter and ordinances under which such assessment is levied are not void because they fail to provide for notice of the assessment. *Garvin v. Daussman*, 114 Ind. 429, followed.

From the Vanderburgh Superior Court.

C. Denby, D. B. Kumler and E. E. Law, for appellant.

J. E. Williamson, for appellee.

118	261
155	241

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COFFEY, J.—On the 21st day of July, 1884, the common council of the city of Evansville passed an order requiring the owners of all lots situate on the east side of Ninth avenue, between Ohio and Pennsylvania streets, in said city, to cause the sidewalk in front thereof to be brought to the proper grade, and to cause a sidewalk of a certain class, therein named, to be laid down thereon, within thirty days from the date of the publication of said order. The owners of said lots having failed to comply with said order, a contract for the doing of said work was awarded to the appellee. Upon apportionment of the costs of said work, there was assessed against the property of the appellant the sum of \$110.25. Upon this assessment a precept was issued to the appellee, under the city charter and ordinances of said city, authorizing him to collect said amount in his own name and for his own use out of the property of the appellant described and abutting on said avenue.

This suit was prosecuted in the Vanderburgh Superior Court for the purpose of collecting said assessment, and declaring the same a lien on said property. The court overruled a demurrer to the complaint and the appellant excepted. Appellant then answered in two paragraphs, the first being a general denial. A reply was filed to the second paragraph, and the cause, being at issue, was tried by the court, which entered a finding and decree as prayed in the complaint.

The appellant assigns as error: 1st. That the court erred in overruling the demurrer to the complaint. 2d. That the court erred in overruling the appellant's motion for a new trial.

The only question argued in this court is the one involving the constitutionality of the city charter and ordinances under which the improvement was made. It is earnestly insisted that said charter and ordinances do not provide for notice of the assessments, and that, therefore, they are void as being in conflict with the Constitution of the United States and the Constitution of this State.

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It is essential to the validity of every law under which proceedings may be had for the taking of the property of an individual, or to impose a burden upon it which may result in taking it, that the law make a provision for giving some kind of notice in the proceeding, and that the owner, at some stage, have the opportunity to be heard before some tribunal authorized to preserve his rights. But the charter and ordinances involved in this suit were fully considered and adjudicated in the case of *Garvin v. Dausman*, 114 Ind. 429. It was held in that case, that as the assessment could only be enforced in a legal proceeding in court, where notice was required, and in a court where ample opportunity would be afforded for questioning the validity of the proceedings for the improvement, and all other matters respecting the legality of the amount assessed, the charter and ordinances in question were not unconstitutional. That case is decisive of this. The court did not err in overruling the demurrer to the complaint; neither did it err in overruling the motion for a new trial.

Judgment affirmed.

Filed April 5, 1889.

No. 13,657.

CUNNINGHAM v. HOFF ET AL.

PLEADING.—*Promissory Note.*--*Loss of.*—*Exhibit.*—Where a copy of a note sued on is filed with the complaint as an exhibit, no allegations in regard to the loss or destruction of the note are necessary to make the complaint good.

BURDEN OF PROOF.—*Instructions to Jury.*—*Promissory Note.*—*Non est Factum.*
—In an action on a promissory note, where there is a plea of *non est*

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factum, an instruction telling the jury that if the plaintiff proved by a preponderance of the evidence that the defendant executed the note, then the burden of proof shifted to the defendant, is right, although the burden of proof as to any particular issue does not change.

From the Carroll Circuit Court.

L. B. Sims, G. R. Eldridge and J. L. Sims, for appellant.
J. Applegate and C. R. Pollard, for appellees.

OLDS, J.—This is an action upon a note alleged to have been executed on the 1st day of July, 1885, by Graham & Cunningham, for the sum of two hundred dollars, payable one year after date, with interest and attorney's fees. It was alleged in the complaint that said note had been accidentally destroyed by fire. Defendant Graham made default. Defendant Cunningham appeared and filed a demurrer to the complaint, which was overruled. The only objection urged to the complaint is that the allegation in regard to the loss or destruction of the note is not sufficient; that it should have been averred that the loss occurred without the fault of the plaintiff. The complaint is sufficient. There was a copy of the note set out with the complaint, and the allegation that it had been accidentally destroyed by fire was a sufficient allegation to excuse the plaintiff from filing a copy of the note as an exhibit to the complaint; but a copy of the note being filed with the complaint, the pleading was sufficient without any allegation in regard to its destruction. The demurrer to the complaint was properly overruled.

Cunningham filed an answer to the complaint, in three paragraphs. One was a denial of the execution of the note, properly verified; the other two were affirmative answers, one alleging that the note was executed without any consideration, and the other alleging that the note was executed by Graham, in the firm name of Graham & Cunningham, in consideration of an individual debt of Graham. Plaintiff filed a reply in denial to the affirmative answers. Trial by jury, and verdict and judgment for plaintiff, the appellee Hoff.

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The only other error assigned is the giving by the court, on its own motion, of instruction number two.

The first instruction presented to the jury the state of the issues, and then followed instruction number two, which is as follows: "Now, under these issues it will be your duty to determine from the evidence whether Cunningham is liable on the alleged note. The burden of the issue is upon the plaintiff to show by a preponderance of the evidence that the defendant Cunningham executed the note mentioned in the complaint. If you find that such a note was executed by Cunningham, then the burden of proof will shift to the defendant, because the presumption, in the absence of evidence, is that there was a sufficient consideration to support the promise to pay the amount expressed in the note." It is contended by counsel for appellant that this instruction is erroneous by reason of the use of the words "then the burden of proof will shift to the defendant;" that it informed the jury that the burden of proof on the issue formed by the plea of *non est factum* changed from the plaintiff to the defendant. We do not think that the instruction, taken in connection with the first instruction, is subject to the objection urged. It is true, the burden on any particular issue does not change. *Fay v. Burditt*, 81 Ind. 433, 443; *Carver v. Carver*, 97 Ind. 497.

This instruction does not inform the jury that the burden on any particular issue shifts. By the issues as stated, the burden of proof only rested on the plaintiff as to the one issue, and as to the other issues in the case the burden rested on the defendant.

The word "shift," in its ordinary use, means to change, and by this instruction the jury were told that the burden rested on the plaintiff as to the one issue, and if that issue was established in favor of the plaintiff by a preponderance of the evidence, then the burden shifted or changed to the defendant. That was correct.

If a preponderance of the evidence established the execu-

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tion of the note by the defendant, then the burden rested on the defendant to establish one of the affirmative defences pleaded, by a preponderance of the evidence bearing upon such issue.

It is true, the word "shift" was not a very appropriate word to use, and it was not very fully stated as to what issues the burden was upon the defendant; but in view of the defendant having the affirmative of all the other issues joined, it could not have misled the jury.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 6, 1889.

118	266
124	334
118	266
130	40
118	266
131	241
132	878

No. 13,466.

MURDOCK v. COX ET AL.

PLEADING.—*Complaint.—Attack after Verdict.*—If a complaint, consisting of two paragraphs, taken as an entirety, states a cause of action in all of the plaintiffs, it is good as against an attack after verdict, although each paragraph states a cause of action only in some, and not in all, of the plaintiffs.

MORTGAGE.—*Consideration.—Parol Proof.*—The consideration of a mortgage may be proved by parol, but it is not competent to contradict by parol the conveying part of such an instrument.

SAME.—*For Support of Mortgagee.—Cancellation.*—Where, after partition of an intestate's property, the widow conveys to the heirs all of her interest in the land, and in consideration thereof and to better secure herself means of support during her life, requires each heir to execute to her a mortgage upon the land set apart to him, for a certain sum, with interest, "to be collected by her only," the mortgagors, upon showing a compliance with the mortgage during the mortgagee's lifetime, and a demand of the proper person after her death for its satisfaction, are entitled to have the mortgage cancelled.

SUPREME COURT.—*Special Finding.—Judgment upon.—New Trial.—Practice.*

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—Where the Supreme Court is satisfied from the record that it would work injustice to direct judgment upon a special finding of facts, it will remand the cause with instructions to grant a new trial.

From the Ripley Circuit Court.

J. G. Berkshire, J. B. Rebuck and G. F. Lawrence, for appellant.

ELLIOTT, C. J.—It is alleged in the first paragraph of the complaint of the appellees that Eli Murdock died, intestate, in 1869; that he was, at the time of his death, the owner of a large quantity of land, and a large amount of personal property, and that all of his indebtedness has been paid; that in February, 1869, the heirs of the intestate partitioned the land of which he died seized, and that his widow, Jane Murdock, conveyed to the heirs all her interest in the land; that the better to secure herself means of support during her life, she required each of the heirs to execute to her a mortgage, upon the land set apart to him, for one thousand dollars, with interest at the rate of six per cent., payable when called for, to be collected “by her and by her only”; that in the division of the land Martha Cox, as one of the heirs, was awarded the west half of the northwest quarter of section ten, town. seven, and part of the southeast quarter of section two, town. seven; that she and her husband executed to Jane Murdock a mortgage for the sum of one thousand dollars “for the purpose aforesaid and not otherwise”; that they have paid all the interest to the mortgagee and have fully complied with the terms and conditions of the mortgage on their part; that Jane Murdock died in June, 1872, and that by her will she made Eliphalet Murdock her sole legatee; that there has been no administrator of her estate, and that the mortgage executed to her is unsatisfied.

The second paragraph is very much the same as the first; the chief difference is that the latter paragraph avers that John Murdock executed a mortgage to Jane Murdock on the part of the land set apart to him, and that Martha Mur-

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dock, one of the plaintiffs, is the owner by purchase of the land set apart to John Murdock.

We think the complaint is sufficient as against an attack after verdict. It avers that the appellees performed all the terms and conditions of the mortgage on their part, and as the complaint was not challenged by demurrer the defects in it are cured by the finding of the court. If each paragraph had been assailed by separate demurrers, it may be that the attack should have prevailed, for the reason that in each paragraph is stated a cause of action only in some and not all of the plaintiffs, but as the attack is made for the first time by the assignment of errors in this court, and is directed against the entire complaint, it is unavailing. Taking the complaint as an entirety, there is a cause of action in all of the plaintiffs, and we must, as has often been decided, treat it as an entirety.

The special finding states the facts relating to the death of Eli Murdock, the partition of the land among the heirs, the execution of the mortgages by the heirs of Jane Murdock, and states also the facts concerning her will and her death, substantially as they are alleged in the complaint. It shows that the mortgages contained this stipulation: "To secure the payment of the sum of one thousand dollars, with six per cent. interest, which is to be paid annually, and to be collected by her only; and the mortgagors expressly agree to pay the sum above secured, without relief from valuation or appraisement laws." The special finding further states that "The only reason and consideration for the giving of said mortgage was that the widow might thereby secure to herself a support during her life. It was further agreed and understood that so far as she did not in her lifetime call for and receive the sums provided and secured by the said mortgages, the same were to be void at her death." The finding also states that the mortgages were all in Jane Murdock's possession at the time of her death, and after her death they were delivered to the mortgagors, respectively.

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It was unquestionably proper to prove by parol the consideration of the mortgages. *Colt v. McConnell*, 116 Ind. 249. It was not, however, competent to contradict by parol the conveying part of those instruments. There is a clear and well defined distinction between proving the consideration of a mortgage and proving by parol an agreement destroying the effect of the covenants contained in it. *Bever v. North*, 107 Ind. 544. The statement in the special finding that there was an agreement that the mortgages should be void in case the mortgagee did not call for the money, adds no force to the finding, and, on the other hand, detracts nothing from it.

We think, however, that the finding is defective, in that it fails to show that there was a demand upon the appellant to satisfy the mortgages, and, also, in that it fails to show that either the principal or interest of the debts secured by them was ever paid, or that the agreement of the mortgagors was ever performed. As the appellees seek to have the mortgages cancelled and satisfied, they have the burden, and the silence of the finding on material points operates against them. *Brown v. Jones*, 113 Ind. 46.

We regard the case as one in which justice demands that a new trial be awarded, and where this is so, it is our duty to reverse the judgment and remand the case, with instructions to grant a new trial. *Buchanan v. Milligan*, 108 Ind. 433; *Bartholomew v. Pierson*, 112 Ind. 430; *Brown v. Jones*, *supra*, and cases cited, p. 50; *Sinker, Davis & Co. v. Green*, 113 Ind. 264. The rule, as the cases we have cited show, is now well established, that where the court is satisfied from the record that it would work injustice to direct judgment upon the special finding of facts, it will remand the cause with instructions to grant a new trial.

Judgment reversed, with instructions to direct a new trial.

BERKSHIRE, J., did not participate in the consideration or decision of this case.

Filed April 6, 1889.

No. 13,469.

JOHNSON v. PONTIOUS.

REAL ESTATE.—Ejectment.—Quieting Title.—Pleading and Proof.—Where the plaintiff in an action of ejectment, or in a suit to quiet title, alleges a legal title, a recovery can not be had by proof of an equitable title.

SAME.—Statutory Provisions.—All the provisions of the statute in regard to actions to recover possession of real estate apply to suits to quiet title.

SAME.—Parol Contract of Purchase.—Equitable Title.—To constitute an equitable title to real estate under a parol contract of purchase, the claimant must show that possession was taken under the contract, and that the purchase-money was paid.

SAME.—Specific Performance.—A parol contract for the sale of real estate, the specific performance of which a court of equity will enforce, must be one that is complete and definite, and it must be just and fair in all of its provisions.

PLEADING.—Complaint. — Cross-Complaint.—General Rules.—The general rules which govern a complaint also govern a cross-complaint.

From the Fulton Circuit Court.

M. L. Essick and O. F. Montgomery, for appellant.

J. S. Slick and F. H. Terry, for appellee.

BERKSHIRE, J.—This is an action brought by the appellant against the appellee for the partition of certain real estate situated in Fulton county. The appellee answered the complaint by filing a general denial. He also filed a cross-complaint, to which the appellant answered by filing a general denial. The cause was tried by the court, without a jury, and a general finding made for the appellee. The appellant filed a motion for a new trial, which was overruled and the proper exception reserved, after which the court rendered a general judgment for the appellee.

There is but one error assigned, and that is that the court erred in overruling the motion for a new trial.

118	270
196	284

118	270
130	263

118	270
139	85

118	270
142	221

118	270
148	357

118	270
158	363

118	270
164	98

Johnson v. Pontious.

There are but two reasons assigned for a new trial: 1. The decision of the court is not sustained by sufficient evidence; and, 2. The decision of the court is contrary to law.

The main and only principal question in the case is whether or not there is any evidence to support the finding of the court. It is admitted that Solomon Pontious died on the 31st day of August, 1869, intestate, and the owner of the land in controversy and holding the legal title thereto, and that he left, as his only heirs-at-law, Isaac, Levi, Samuel, Moses, John, Edward, Joseph, Aaron and Jonathan Pontious, Hester Hoffman, Elizabeth Brown and Mary Shafer, all being sons and daughters of the decedent; that in the year 1885 Isaac Pontious, one of said sons, died intestate, leaving as his only heirs-at-law Jefferson, Isaac and Rachel Pontious, Lucetta Rupert, Louisa Gurlich, Mary Marrett and Henrietta Myers, all being sons and daughters of the decedent. A quitclaim deed, bearing date November 8th, 1869, from Edward Pontious, the appellee, to one Adam Hoffman, for the real estate in controversy, was introduced in evidence by the appellant; and also a quitclaim deed, bearing date April 13, 1886, from all of the heirs of Solomon Pontious, except the appellee and Isaac, who had deceased, and all of the heirs of Isaac, except Rachel. Adam Hoffman, the grantee of the appellee, was one of the grantors in this deed. There is no controversy but that the legal title was in the appellant at the commencement of the action, except as to one eighty-fourth, which Rachel, the daughter of Isaac, conveyed to the appellee, and which the appellant concedes was and is in the appellee.

The appellee alleges in his cross-complaint that he is the owner in fee simple of the real estate in controversy, and asks that his title thereto be quieted.

Whenever, in an action of ejectment or to quiet title, the complaint or cross-complaint alleges a legal title, a recovery

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can not be had by proof of an equitable title. *Stout v. McPheeters*, 84 Ind. 585; *Hunt v. Campbell*, 83 Ind. 48; *McMannus v. Smith*, 53 Ind. 211; *Stehman v. Crull*, 26 Ind. 436; *Rowe v. Beckett*, 30 Ind. 154; *Groves v. Marks*, 32 Ind. 319.

The foregoing were cases to recover the possession of real estate, but all of the provisions of the statute in regard to actions to recover the possession of real estate apply to actions to quiet title. *Green v. Glynn*, 71 Ind. 336. The same general rules govern a cross-complaint that govern a complaint. *Rausch v. Trustees, etc.*, 107 Ind. 1; *Conger v. Miller*, 104 Ind. 592.

The finding of the court covered the issues joined upon the cross-complaint as well as those joined upon the complaint, and the appellee, upon the finding of the court, was as much entitled to a judgment quieting his title as he was to a judgment in the main action; and taking the issues, finding and judgment into consideration, we are of the opinion that the judgment rendered as effectually quieted the appellee's title as if it had done so *pro forma*. As the cross-complaint declared upon a legal title, and as the legal title was conceded to be in the appellant, the court should at least have found for the appellant upon the issues joined upon the cross-complaint and rendered judgment for appellant accordingly, and in finding for the appellee generally and in rendering a general judgment in his favor the court committed an error. But, upon the evidence, was the appellee entitled to a judgment in the main action?

No question of tenancy or notice was raised in the court below. The appellee defended the action upon the theory that he was the equitable owner of the land through a parol contract of purchase from his brothers and sisters and Hoffman, to whom he had theretofore conveyed his undivided interest. He claims to have made a parol contract for the land, to have entered into possession under the contract, and to have made lasting and valuable improvements thereon.

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Unless there was a contract, possession taken under it, and a payment of the purchase-money, the appellee held no equitable title and could not successfully defend the action on the ground of equitable ownership. *Walter v. Hartwig*, 106 Ind. 123; *Barnes v. Union School Tp.*, 91 Ind. 301; *Hays v. Carr*, 83 Ind. 275; *Burns v. Fox*, 113 Ind. 205; *Wallace v. Long*, 105 Ind. 522.

Solomon Pontious, the ancestor, left twelve children, each inherited a one-twelfth of the real estate in question.

The testimony of the appellee, given as a witness in his own behalf, is as follows: "The land is in my possession; I moved on the land in 1873; it was not cleared when I went there; have lived there ever since, and now live there; I improved the land by ditching, clearing, building house and barn, planting an orchard, and otherwise; Samuel and Isaac first spoke to me about buying the land; I saw all of them I could, and wrote to the others; John, Elizabeth and Aaron were away; I was to have the land at twenty-five dollars per share, or three hundred dollars for the whole; I was to pay as soon as I could do so; I went into possession because they agreed to sell it to me; it was in the fall of 1872 when I talked with them; I never paid anything except in work; I did work for Isaac; he said I could go on the land; Samuel said my work should go on the land; nothing was ever claimed until Isaac died, which was in 1885; the 27th of July, last, was the first they ever claimed anything; the land is most all improved; I was at Bright's when the deed was there; Joseph and Levi and their wives signed the deed; I do not know why the deed was never completed; I had a talk with Isaac about it; some of the heirs helped me to build the house; they lived in the neighborhood; all of them have stayed over night with me."

On cross-examination the witness testified: "I paid the taxes on the land up to 1882; I did not feel like paying taxes after that, because I did not know what I was going to do;

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when they signed the deed I told them I would give them my note and a mortgage for their shares; Moses said it was all right, just let it go; they wanted to make the deed to my wife; I had a conversation with Samuel about the deed, but none with Jefferson."

No other witness than the appellee testified as to any contract for the purchase of the real estate in controversy. It is hardly necessary to say that his testimony comes far short of proving a contract for the sale of land, such as a court of equity will recognize and enforce. It is not pretended that there was a contract with all of the heirs; some of them that were absent were written to, but there is no evidence tending to show that they received the letters or answered them. Samuel and Isaac spoke to the appellee about buying the land first, and afterwards he saw all of them that he could. He was to have the land at twenty-five dollars per share, and pay as soon as he could. Which of the heirs agreed to this arrangement is not stated, so far as we are informed from the evidence. Samuel and Isaac are the only ones that the appellee talked with, and they simply spoke to him about buying the land. The remainder of the testimony consists of general and indefinite statements, so far as it related to the contract and the persons with whom the conversations took place.

A parol contract for the sale of real estate, the specific performance of which a court of equity will enforce, must be one that is complete and definite, and must be just and fair in all of its provisions. *Ikerd v. Beavers*, 106 Ind. 483.

The evidence fails to show that the appellee went into possession under the contract. The evidence is, "I went into possession because they agreed to sell it to me." Because some one had agreed to sell him the land, the appellee, of his own accord, took possession of it. But, in addition to all this, not one dollar of the purchase-money has been paid, except some work done for Isaac, and no disposition or inclination shown to make payment, notwithstanding fifteen or sixteen

Jenkins *et al.* v. Stetler.

years have elapsed since the date at which it is claimed the contract was made.

There is no evidence to support the finding of the court, and the judgment is reversed, with costs.

Filed April 16, 1889.

No. 13,530.

JENKINS ET AL. v. STETLER.

STREET IMPROVEMENT.—*Surplus Earth.*—The validity of a provision in an ordinance authorizing a street improvement that surplus earth accumulating in the course of the improvement shall belong to the contractor, can not, under section 3165, R. S. 1881, be questioned in a proceeding to enforce an assessment.

SAME.—*Estoppel.*—Where a common council acquires jurisdiction and makes a contract for a street improvement, a party benefited, who stands by, without objecting, until the work is completed, is liable for the amount assessed against him as benefits.

SAME.—*Estimate. Precept. Presumption.*—In the absence of an answer showing that the improvement was not completed according to the contract, the court must presume that the city engineer, in reporting a final estimate, and the common council, in ordering a precept, did their duty.

SAME.—*Affidavit for Precept.*—It constitutes no valid objection to the affidavit for a precept that it was signed and sworn to by only one of two contractors.

SAME.—*Extension of Time for Completing Improvement.*—The time of the contractors for the completion of the work, as fixed in the contract, may be lawfully extended by a vote of the common council.

SAME.—*Amendment of Transcript or Precept.*—The circuit court has no authority to amend the transcript or precept, or to authorize an amendment thereof, but such amendments must be made by the order or with the consent of the common council, after which an amended transcript may be filed.

From the Clinton Circuit Court.

118	275
119	433
120	191
121	540
118	275
127	178
118	275
130	260
118	275
131	110
118	275
171	254
171	255
171	259

Jenkins et al. v. Stetler.

O. E. Brumbaugh and W. R. Hines, for appellants.

J. N. Sims and S. O. Bayless, for appellee.

MITCHELL, J.—This was an appeal by Stetler from a precept, issued by order of the common council of the city of Frankfort, commanding the collection of certain assessments for street improvements made by William H. and Alfred M. Jenkins, in pursuance of a contract entered into between the latter and the common council above mentioned.

The transcript of the proceedings of the common council shows that, after taking the proper preliminary steps, an ordinance was duly adopted, in which the character and extent of the proposed improvement were described, that notice was afterwards published, to the effect that sealed proposals would be received for the execution of the work, according to the plans and specifications adopted, and that a written contract was entered into between the common council and W. H. and A. M. Jenkins, who were accepted as the lowest and best bidders, on the 27th day of June, 1884, for the execution of the improvement. A report made by the city engineer, and approved and accepted by the common council, showed that the improvement had been completed, according to the contract, from Washington street to Jefferson street, and it appeared from the final estimate of the engineer that there was due from the appellee, an abutting lot-owner, a specified sum. Upon an affidavit of one of the contractors, the precept appealed from was issued by the order of the common council.

A demurrer was sustained to the transcript, and this ruling is now before us for review upon appeal. It is urged, as an objection to the validity of the proceedings, that both the ordinance providing for the improvement and the contract made by the common council with the appellants, are "tainted with illegality."

This argument is predicated upon the fourth section of the ordinance, which provides, in substance, that the earth exca-

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vated during the progress of the work shall be hauled into any embankment required to be made in the course of the improvement, and that any earth so excavated and not thus needed should belong to the contractors.

The surplus earth, it is contended, belonged to the adjacent property-holders, respectively, and the argument is, that because the fourth section of the ordinance authorized the contractors to appropriate it to their own use, the proceedings were illegal.

We do not find it necessary to inquire concerning the title to surplus earth which accumulates in the course of a street improvement. It is not disclosed that there was any in fact growing out of the improvement involved in the present case, nor that the contractors appropriated any earth belonging to the appellee, or any other person. If it did so appear, the fact would not vitiate the contract so as to exonerate the appellee from paying for the benefit of a completed improvement, which presumably enhanced the value of his property to an amount equal to the sum assessed against it. The provision in the ordinance in reference to the disposition of the surplus earth, relates to a matter which arose prior to the making of the contract, and by the very terms of the statute is no longer a subject of inquiry. Section 3165, R. S. 1881; *Ross v. Stackhouse*, 114 Ind. 200; *Clements v. Lee*, 114 Ind. 397. Where a common council, by taking all the necessary preliminary steps, acquires jurisdiction, and makes a contract for street improvements, a party benefited will not be permitted to stand by until the work is completed, and then claim exoneration when the contractor seeks to obtain pay for his work.

The next objection urged is, that there is a fatal variance between the improvement as it is described in the ordinance and contract respectively, and in the final estimate of the city engineer, and in the affidavit of the contractors and the precept. The city engineer reported a final estimate and certified that the work was completed, and the common council

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approved the report and ordered the precept upon the affidavit of the contractor. In the absence of an answer showing that the work was not completed according to contract, the court must presume that the city engineer and common council of the city did their duty.

It constitutes no valid objection to the affidavit for a precept that it was signed and sworn to by only one of the two contractors, and not by both.

We know of no reason why the time of the contractors for the completion of the work, as fixed in the contract, might not lawfully be extended by a vote of the common council, nor can we perceive any reason for holding that such an extension, in the absence of fraud, should, without more, make the proceedings void.

The circuit court had no authority to amend or authorize any amendment to the transcript or precept. If either the transcript or precept was imperfect or defective, it should have been amended—to the extent that it was amendable—by the order or consent of the common council, after which an amended transcript could have been filed. *Wells v. Rhodes*, 114 Ind. 467. The court erred in sustaining the demurrer to the transcript.

The judgment is therefore reversed, with costs.

Filed April 16, 1889.

Emerich v. The City of Indianapolis.

No. 14,826.

EMERICH v. THE CITY OF INDIANAPOLIS.

INTOXICATING LIQUOR.—Municipal Corporation.—Jurisdiction of.—Special Tax.—The Legislature may empower municipal corporations to lay a special tax upon persons engaged in selling intoxicating liquors, and it may also determine over what territory the jurisdiction of such corporations shall extend.

SAME.—Restriction of Business.—Municipal Protection.—The object of this class of legislation is to restrict the business of liquor-selling, and not to secure to the venders the protection of the municipal government, and therefore one is not exempted from the payment of the special tax because his place of business is outside of the corporate limits.

SAME.—Proximity of Business to both Town and City.—The fact that the vender's place of business is within two miles of both a town and a city does not impair the right of the latter to exact a license fee, as its jurisdiction extends so far, while that of the town does not.

From the Marion Superior Court.

J. M. Cropsey, F. M. Wright and E. Marshall, for appellant.
H. E. Smith, for appellee.

ELLIOTT, C. J.—The appellant was convicted of violating an ordinance of the city of Indianapolis by selling intoxicating liquor without having obtained a license from the municipal authorities. In the superior court, to which the case went by appeal from the mayor's court, an answer was filed by the appellant wherein it is alleged that his place of business is outside of the corporate limits of the city, but within two miles thereof; that it is in the township of Wayne and within two miles of the corporate limits of the town of Haughville; that he is a resident of Wayne township, and not of the township of Center, in which the city of Indianapolis is situated.

It is now established law that the Legislature has power to impose restrictions upon the sale of intoxicating liquors, and to empower municipal corporations to lay a special

118	279
119	495

118	279
138	40

118	279
148	27

118	279
163	133
163	514

118	279
168	639

118	279
169	193
169	196

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license tax upon persons engaged in the business of dram-selling. *Lutz v. City of Crawfordsville*, 109 Ind. 466, and cases cited; *City of Frankfort v. Aughe*, 114 Ind. 77; *Vinson v. Town of Monticello*, ante, p. 103; *Wagner v. Town of Garrett*, ante, p. 114. The Legislature has the power, as was demonstrated in *Lutz v. City of Crawfordsville*, supra, to determine over what territory the jurisdiction of a municipal corporation shall extend.

We are referred to the case of *Metropolitan Police Board v. Board, etc.*, 13 West. R. 487, as an authority against the right of municipal corporations to impose restrictions upon persons outside of the corporate limits engaged in the business of selling liquor, but we do not regard the decision in that case as in point. Liquor-sellers are subjected to the payment of a special tax, because the object of this class of legislation is to restrict the business, and not because its object is to secure to the liquor-sellers the benefit or protection of the municipal government. The liquor-seller is compelled to pay a special tax, in the form of a license fee, in order that the business may be restricted to fewer persons, and not be open, like other pursuits, to every one without the payment of any special tax. The theory of the legislation upon this subject is, that the business is one which requires restraint because it is harmful to society, and a license fee is exacted for the purpose of restricting the business, and not for the purpose of increasing the traffic. *Hedderich v. State*, 101 Ind. 564; *Lutz v. City of Crawfordsville*, supra. The law in exacting a license fee does not grant a privilege that did not before exist, but, on the contrary, lays a special tax upon a pursuit which, but for the statute, might be followed without paying any special tax. There is, therefore, no just reason for affirming that a person who can secure no benefit from the municipal government should be exempt from the special tax imposed upon those who engage in the business of selling liquor.

The fact that the appellant's place of business is within

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two miles of the town of Haughville does not impair the right of the city of Indianapolis to require him to pay a license fee. If the jurisdiction of the town extended to his place of business a different question would be presented, but it does not. The jurisdiction of the city of Indianapolis does extend over it, and the ordinance is, therefore, not ineffective.

Judgment affirmed, with ten per cent. damages.

Filed April 16, 1889.

118	281
125	237
118	281
128	352

No. 13,695.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILROAD
COMPANY v. HOLDRIDGE.

RAILROAD.—Round-Trip Ticket.—Return Coupon.—Rights of Passenger as to.

(Where one, holding an unused round-trip ticket from W. to M., two stations upon the line of a railroad, enters upon a train at M., the return station, he is entitled to have the return part of such ticket, by whomsoever detached from the other part, accepted in payment for his transportation to W.)

SAME.—Expulsion from Train.—Liability of Company.—If a conductor refuses to accept a return coupon from a passenger, upon the return journey, who detaches such coupon from the other part of the ticket in his presence and tenders the same to him, and requires the passenger to leave the train at the next station, in order to avoid forcible expulsion, he is guilty of an act of oppression for which the railroad company is liable.

SAME.—Damages.—What not Excessive.—A passenger, who was entitled to be carried to his destination upon a ticket tendered by him but refused by the conductor, in pursuance of the commands of the latter left the train at the next station to avoid forcible expulsion, but he immediately

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boarded the train again, paid his fare from that station to his destination, and was duly carried there.

Held, that two hundred dollars damages are not excessive compensation for the feelings of humiliation and shame suffered by him.

ELLIOTT, C. J., and MITCHELL, J., dissent.

From the White Circuit Court.

N. O. Ross, for appellant.

W. E. Uhl, for appellee.

COFFEY, J.—This cause was decided in the circuit court upon an agreed statement of facts. The material facts, as agreed upon, are, that, on the 8th day of July, 1886, the appellee purchased from the ticket agent of the appellant a round-trip ticket from the town of Walcott to the town of Monticello and return, said towns being regular stations on the appellant's road. Said ticket had printed on one end thereof, commencing in the middle of the paper on which they were printed, and extending down to one end, these words: "Chicago, St. L. & Pitts. R. R. Co. Walcott, Ind., to Monticello, Ind. Good for continuous trip only on trains stopping at points named, when stamped by selling agent. Not good if detached. 7014." And on the reverse end, commencing in the middle and extending down to the end, were printed these words: "Chicago, St. L. & Pitts. R. R. Co. Monticello, Ind., to Walcott, Ind. Return ticket. Good for continuous trip within thirty (30) days from date of sale, on trains stopping at points named. 7014." The ticket was stamped by the selling agent July 8th, 1886. On the day of the date of said ticket, the appellee entered one of the appellant's regular trains at Monticello as a passenger, to be conveyed to Walcott, at which last named place said train stopped to receive and discharge passengers. After the train had started on its trip, the appellee tendered to the conductor in charge of said train the said ticket in payment of his fare, no part of which ticket had been used, cancelled or detached. Appellee was informed by the conductor that if he received the ticket in payment of his fare he would have to retain the

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whole ticket, which the appellee refused to permit him to do, and insisted that the first part of the ticket, which was for a passage from Walcott to Monticello, should be returned to him. The conductor then returned the ticket to the appellee, and told him he could keep the ticket and pay his fare or he must get off the train. The plaintiff then, in the presence of said conductor, detached the return part of the ticket and tendered it in payment of his fare, which the conductor refused to accept, and told him he must pay his fare or get off at the next station, and then left him. When the train stopped at Reynolds, which was the first station after leaving Monticello, in obedience to the conductor's order, appellee stepped off the train to the platform, and remained there until the conductor cried "all aboard," when he again entered said train, paid his fare from that point to his destination, which was twenty-five cents, and was carried to Walcott. He left said car at Reynolds to avoid forcible expulsion. The regular fare, on said 8th day of July, 1886, from Monticello to Walcott was forty-five cents for all persons not having a round-trip ticket, and a like sum from Walcott to Monticello, a reduction of ten cents being made for those who bought round-trip tickets. At said date, conductors on the appellant's road were under orders to take up the whole of round-trip tickets when tendered in payment for fare from the return station, unless the holder chose to keep the ticket and pay full fare, which was one of the rules adopted by the appellant, but the public generally had never been apprised of said rule, by publication or otherwise, and the appellee had no notice of such rule until the time complained of. No part of said ticket has since been used, either by the appellee or any one else.

Upon these facts the court found for the appellee, and assessed his damages at two hundred dollars. Over a motion for a new trial the court rendered judgment on said finding.

The errors assigned are :

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1st. That the court erred in its conclusions of law upon the agreed facts.

2d. That the court erred in rendering judgment in favor of the appellee for two hundred dollars ; and,

3d. That the court erred in overruling the motion for a new trial.

It is clear that the appellee had the right to demand of the appellant that he be transported from Monticello to Walcott on his return ticket, and that when such ticket was tendered to the conductor it was his duty to accept it in payment of such transportation. There was nothing in the contract between the parties which gave to the appellant the exclusive right to detach that part of the ticket which gave the appellee the right to ride on the appellant's road from Walcott to Monticello from the return ticket. If it became worthless by reason of being detached by the appellee, that furnished the appellant no excuse for refusing to accept the return ticket. The appellee was rightfully on the appellant's train, and had the right, as we have said, by the terms of the contract, to be transported from Monticello to Walcott, and the act of the conductor requiring him to leave said train in order to avoid forcible expulsion was an act of oppression for which the appellant was liable.

It is claimed, however, by the appellant that the damages assessed by the circuit court are excessive. In the well considered case of *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381, the authorities upon this subject are collected and carefully considered. In that case, ELLIOTT, J., who wrote the opinion, says : " One who acts in good faith ought not to be deprived of his rights through the fault of the servant of the carrier who has undertaken to carry him safely. It is the duty of carriers to provide agents and servants who can, and will, properly protect the interests of passengers, and not by want of skill, lack of knowledge, or want of care, take from passengers rights for which they have contracted and paid." In discussing the question of damages, in that case, the court

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says : " In estimating compensatory damages, it is proper to consider the humiliation and degradation imposed upon the injured person by the wrong done him. The fact that the wrong is done under circumstances of peculiar indignity and degradation is to be considered as an element of compensation, even in cases where vindictive damages can not be given. In *Taber v. Hutson*, 5 Ind. 322, the court held that only compensatory damages were recoverable by the plaintiff, but said : ' He was not, it is true, confined to the proof of actual pecuniary loss ; the jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, in short, his individual happiness.' "

In 3 Wood Railway Law, section 364, the learned author says : " Thus, where a party is forcibly and unlawfully ejected from a car, in the presence of other passengers, and the conductor publicly announces that the passenger has refused to pay his fare, a jury may properly find from such facts that the party thus ejected suffered feelings of shame and humiliation, without any other proof on that subject." In support of the text, the author cites *Chicago, etc., R. W. Co. v. Chisholm*, 79 Ill. 584, and *Chicago, etc., R. W. Co. v. Williams*, 55 Ill. 185.

In cases of this kind there is no rule by which the amount of damages to be recovered for shame, humiliation and injured feelings can be measured, and it must, of necessity, be left to the jury or the court trying the cause to fix the sum he shall have as compensation. The rule is that a verdict will not be set aside on the ground of excessive damages unless they are such as, at first blush, appear to be outrageous. *Yater v. Mullen*, 23 Ind. 562 ; *Reeves v. State, ex rel.*, 37 Ind. 441 ; *Alexander v. Thomas*, 25 Ind. 268. In the case of *Lake Erie, etc., R. W. Co. v. Fix, supra*, the damages assessed were \$600, and it was held not to be excessive. In the case of *St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566, the

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damages assessed were \$562, and it was held not to be excessive. In the case of *Jeffersonville, etc., R. R. Co. v. Rogers*, 38 Ind. 116, the damages assessed were \$1,000, and the court refused to disturb the judgment. In the case of *Indianapolis, etc., R. R. Co. v. Milligan*, 50 Ind. 392, the damages assessed were \$700, and it was held not to be excessive.

In this case, as we have said, the appellee was entitled to transportation on his return ticket from Monticello to Walcott, and tendered it to the conductor in payment of his fare. The conductor of appellant's train refused to receive such ticket, and wrongfully compelled the appellee to leave the train in order to avoid a forcible expulsion. The court had the right to infer from these facts that he was humiliated, and that his feelings were injured, and the right also to assess such damages as in its judgment would compensate the appellee for such injury. The amount assessed does not, at first blush, appear to be outrageous.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

ELLIOTT, C. J., and MITCHELL, J., dissent.

Filed April 17, 1889.

No. 13,533.

FULTON ET AL. v. LOUGHLIN.

PROMISSORY NOTE.—*Partnership.*—*Endorsement to One Partner.*—*Right of Action.*—One partner, during the continuance of the partnership, has implied authority to endorse notes payable to the firm, in the firm name, and if, by mutual agreement between the members, a note so payable is endorsed and sold to one of the partners, the latter becomes the owner thereof and may maintain a suit thereon in his own name.

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SAME.—*Sufficiency of Endorsement.*—*Defect of Parties.*—*Demurrer.*—Where it is averred in a complaint upon a promissory note that the plaintiff is the owner of the note by endorsement from the payee, the sufficiency of the endorsement can only be tested by a demurrer assigning as cause that there is a defect of parties.

SAME.—*Officers of Corporation.*—*Signing in Individual Capacity.*—*Non Est Factum.*—In an action on a promissory note, which is in form that of the makers and does not on its face purport to be the obligation of the corporation of which they are officers, if the defendants do not deny under oath that they executed it in the character in which they are sued, it is confessedly the paper of the makers.

SAME.—*Debt of Third Person.*—*Consideration.*—A promissory note, negotiable according to the law merchant, is not void for want of a consideration if it be given for the antecedent debt of a third person and be made payable at a future day.

From the Jay Circuit Court.

D. T. Taylor, J. M. Smith, J. W. Headington, J. J. M. La-Follette, T. Bailey and R. H. Hartford, for appellants.

S. W. Haynes and W. E. Cox, for appellee.

MITCHELL, J.—This is an appeal from a judgment of the Jay Circuit Court, rendered in an action by Loughlin against Fulton and others to recover the amount alleged to be due upon a promissory note executed by the defendants, and payable to the order of Loughlin & Scott at a bank in this State. It is alleged in the complaint that the note was endorsed in writing on the back thereof by Loughlin & Scott, in their firm name, and that it was sold to the plaintiff, Loughlin, who is alleged to be the owner thereof.

Objection is made to the complaint because it is said these allegations do not sufficiently show that the note was endorsed to the plaintiff below, as the endorsement of Loughlin & Scott to Loughlin was, in effect, an endorsement by Loughlin of one-half interest in the note to himself. There is no point to this objection.

It does not appear upon the face of the complaint that the plaintiff, the endorsee, is a member of the firm of Loughlin & Scott. If it did, the complaint would be good neverthe-

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less. One partner, during the continuance of the partnership, has implied authority to endorse notes payable to the firm, in the firm name, and if, by mutual agreement between the members, a note so payable is endorsed and sold to one of the partners, the endorsee, in the absence of anything appearing to the contrary, becomes the legal as well as the equitable owner of the note, and may maintain a suit thereon in his own name. *Burnham v. Whittier*, 5 N. H. 334; 1 Lindley Partnership, p. 268.

Besides, where it is averred in a complaint that the plaintiff is the owner of a note by endorsement from the payee, the sufficiency of the endorsement can only be tested by demurrer, assigning for cause that there is a defect of parties. *Eichelberger v. Old Nat'l Bank*, 103 Ind. 401.

The only substantive defence pleaded was that the note sued on was executed without any consideration. The evidence tended to show that the makers of the note were the officers and trustees of the Portland Normal School, an incorporated company, and that it was given in settlement of an account for school furniture theretofore purchased by the makers, for and on behalf of the company, the furniture having been delivered to the company some four months before the execution of the note.

There was also some evidence tending to show that the payees of the note sold and delivered the furniture on the credit and responsibility of the makers, as individuals, and not to, or on the credit of, the corporation.

The note is in form that of the makers, and does not on its face purport to be the obligation or promise of the corporation; nor did the defendants deny under oath that they executed it in the character in which they were sued. It was therefore confessedly the mercantile paper of the makers, falling due sixteen months after its date. *Williams v. Second Nat'l Bank*, 83 Ind. 237.

It is quite true, as is contended, that a contract to pay the debt of a third person must be supported by a sufficient con-

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sideration. But a promissory note, negotiable according to the law merchant, is not void for want of a consideration, if it be given for the antecedent debt of a third person and be made payable at a future day. Such a note operates to satisfy the debt, *prima facie*, or at least to suspend the right of the creditor to enforce payment until the note matures, and an express or implied agreement to delay the collection of a precedent debt is a sufficient consideration to support the promise of a third person. *York v. Pearson*, 63 Maine, 587; *Thompson v. Gray*, 63 Maine, 228; 1 Daniel Neg. Insts., section 185.

In addition, there was evidence from which the court may have found that the furniture was sold to or upon the credit of the makers of the note. In that event there could have been no question about the sufficiency of the consideration. This disposes of all the questions in the record, and results in an affirmance of the judgment.

Judgment affirmed, with costs.

Filed April 17, 1889.

 No. 14,122.

NIKLAUS ET AL. v. CONKLING.

STREET IMPROVEMENT.—*Assessment.*—*Construction of Statutes.*—Statutes conferring power upon municipalities to make assessments for street improvements must be strictly construed.

SAME.—*Quantity of Ground Affected by Assessment.*—The statute of 1881 (R. S. 1881, section 3163), authorizes cities to levy an assessment upon ground abutting on the improvement to a distance of fifty feet back from the front line, and no more can be affected.

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SAME.—*Act of 1885 Not Retrospective.*—The act of 1885 (Acts of 1885, p. 207), relating to street improvements, does not enlarge the lien of a contractor where the work was completed and a sale had upon a precept prior to the passage of such act.

STATUTE.—*Construction.—Prospective Operation.—Legislative Intention.*—Unless a contrary intention clearly and strongly appears, and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would materially change existing rights.

From the Jennings Circuit Court.

J. G. Berkshire and *G. F. Lawrence*, for appellants.

A. G. Smith, for appellee.

ELLIOTT, C. J.—The appellee instituted this action to enforce an assessment for a street improvement made under a contract entered into prior to the 24th day of November, 1882. The work under the contract was completed in November, 1882, estimates were made and approved, and precepts were issued on the assessment, directing the sale of a strip of the appellant's ground fifty feet in width. On one of these precepts a sale was made, and the strip bid in at the sale by the appellee, on the 28th day of November, 1883.

At the time the proceedings we have mentioned were had, the act of April 14th, 1881, was in force, and in it, among others, was written this provision concerning the lien of assessments for street improvements: "In all contracts specified in the last preceding section, the cost thereof shall be estimated according to the whole length of the street or alley, or the part thereof to be improved; * * and the city shall be liable to the contractor for so much thereof only as is occupied by public grounds of the city bordering thereon and the crossings of streets and alleys; and the owners of the lots * * shall be liable to the contractor for their proportion of the cost, in the ratio of the front lines of the lots owned by them to the whole improved line; and in making the assessments against such owners for the improvement, the ground shall be assessed across the ground fronting or immediately abutting

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on such improvement, back to the distance of fifty feet from such front line, whether such ground be subdivided by platting or conveyance or in any other manner." R. S. 1881, section 3163.

It will be observed that the general terms employed by the statute cover only the front line, but that the specific terms—those which expressly direct how the assessment shall be made, provide that the ground shall be assessed back to the distance of fifty feet from such front line. The authority to levy the assessment is purely statutory, and no other assessment than such as the statute prescribes can be made. *State, ex rel., v. Aetna L. Ins. Co.*, 117 Ind. 251. As it is solely by virtue of the naked statutory power that cities have a right to levy an assessment, they can not levy it upon other property, or upon more property than the statute authorizes.

As the statute of 1881 authorizes them to levy upon fifty feet, they can not, under that statute, rightfully levy an assessment upon a greater quantity of ground.

Statutes conferring power to make such an assessment as the one before us are to be strictly construed. In cases like this, says the Court of Appeals of New York, the municipality "must produce express power therefor in legislative enactment, and must show that in its attempt to tax, it has strictly followed all the legal requirements." *Matter of Second Avenue Church*, 66 N. Y. 395. *Griswold v. Pelton*, 34 Ohio St. 482, is a case very like the present, and it was held that the assessment could not legally cover more ground than the statute designated.

It is contended by the appellee's counsel that the act of 1885 enlarged the right of his client, and extended the assessment to one hundred and fifty feet of ground. Acts of 1885, p. 207. We can not concur in this view. Without enquiring or deciding whether the Legislature has power to enlarge the lien of a contractor, by changing the quantity of land upon which it fastens from fifty to one hundred and fifty feet, we hold that the act of 1885 does not assume to do

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this in a case like the present, where the contract has been fully completed and the land bought in at a sale upon a precept prior to the passage of the act. If the power exists at all, it can not be deemed to have been exercised, for there are no words justifying that inference. The words of the act refer not to estimates or assessments previously made, but to such as may be made after its adoption. It declares that the cost of the improvements "shall be estimated according to the length of the whole street or alley;" and this language can not apply to a case where, as here, the estimate was made and enforced by sale on a precept prior to the enactment of the statute. We can not, in such a case as this, omit the consideration of the important rule that statutes will not be given a retrospective operation unless the language employed imperatively requires it. Courts will not give a statute a retroactive effect, so as to change existing rights, unless the language employed is such as to compel them to that course. It requires, many of the cases declare, "express declarations," "positive expressions," or "direct expressions," to secure for a statute a retrospective operation. *Hickson v. Darlow*, 52 L. J. Ch. 453; *Bedford v. Shilling*, 4 Sergt. & R. 401, 408; *Lefever v. Witmer*, 10 Pa. St. 505; *Henderson v. State, ex rel.*, 96 Ind. 437, and cases cited; *Stilz v. City of Indianapolis*, 81 Ind. 582; *McGovern v. Connell*, 43 N. J. L. 106; *Charless v. Lamberson*, 1 Iowa, 435. We do not decide, however, that where the intention is clear, although not expressed in direct and positive language, a statute may not, where no existing rights are disturbed, be given a retroactive effect. *Connecticut, etc., Ins. Co. v. Talbot*, 113 Ind. 373. We do, nevertheless, decide that unless the intention clearly and strongly appears, and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would materially change existing rights.

We have not considered the question of the effect of the appellee's purchase at the sale upon the precept, although we

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are inclined to the opinion that he had no right to repudiate a sale made at his own instance and bring an action to enforce the assessment. It seems to us that as long as the sale stands without attack, he can not, of his own motion, disregard it and institute an independent action. If a stranger had bid at the sale, we think the appellee might have enforced the bid. *Mitchell v. Weaver, ante*, p. 55. But this question we do not decide, for the answers of the appellants concede that the appellee is entitled to a lien upon fifty feet of ground.

Judgment reversed, with instructions to the trial court to restate conclusions of law, and to enter a judgment ordering the sale of fifty feet of the land to satisfy the assessment in favor of the appellee.

BERKSHIRE, J., did not take any part in the decision of this case.

Filed April 17, 1889.

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No. 13,212.

GRAY v. SUPREME LODGE, KNIGHTS OF HONOR.

BENEFIT SOCIETY.—*Certificate.—Mistake.—Reformation Against Beneficiary.*—

Where a member of a benefit association contracts for and pays the amount necessary to obtain a certificate for only one thousand dollars, but by the mistake and inadvertence of both parties, or by the mistake of the association, with knowledge on the part of the member, a certificate for two thousand dollars is issued and accepted, the association is entitled to a reformation in an action by the beneficiary upon the certificate.

SAME.—*Payment of Assessments.—Averments as to.*—In an action by the beneficiary upon a benefit certificate, an answer that the insured had wholly failed to pay the assessments against him, wherefore he had been sus-

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pending and had forfeited the right to recover on the certificate, is sufficient, without alleging that the assessments were not paid by any other person. If the assessments were paid by any other person, that is matter for reply.

SAME.—*Notice of Contract and By-Laws.—Beneficiary Bound to Take.*—A beneficiary is bound to take notice of the terms of the contract between the insured and the benefit association, including the by-laws of the latter, which enter into the contract, and where such beneficiary, in meeting assessments accruing on the certificate, pays only the amount entitling her to one thousand dollars on the death of the insured, she can not resist the reformation of a certificate issued by mistake for a larger sum, on the ground that she, without knowledge of the mistake, had expended money and contracted debts on the faith of the amount stated in the certificate.

SAME.—*Deduction of Assessments.—Reformation of Certificate.*—Where an insurance certificate has been issued by mistake of the parties for a larger sum than that contracted for, and only assessments necessary to keep alive a certificate for the amount intended to be stated have been paid, the beneficiary can not, by offering to allow the additional assessments to be deducted, recover the amount erroneously inserted, over a demand by the insurer for a reformation.

From the Marion Superior Court.

A. F. Denny, for appellant.

W. D. Bynum and *A. T. Beck*, for appellee.

OLDS, J.—This is an action by the appellant against the appellee on a benefit certificate issued by the appellee to Columbus V. Gray, the husband of appellant, in his lifetime, in which certificate the appellant is named as the beneficiary, for the sum of two thousand dollars, to be paid upon the death of said Columbus V. Gray out of the widows' and orphans' funds of said association, the appellee.

The complaint is in the usual form, and no question is presented upon the complaint. The appellee answered in two paragraphs. Appellant demurred separately to each paragraph for want of facts; the demurrers were overruled, and appellant excepted and assigns error.

Appellant filed a reply in two paragraphs, and a demurrer was filed and sustained as to the second paragraph, which ruling is also assigned as error.

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The first paragraph of the answer alleges a mutual mistake in the issuing of the policy, whereby it was issued for \$2,000 instead of \$1,000, and it is contended that the allegations are insufficient, and that it is not such a mistake as can be corrected. The allegations in the answer as to the mistake are as follows: "That by the laws, rules and regulations of the association it was, and has ever since remained, the duty of each and every member, upon presenting himself to receive the third degree, or degree of manhood, to pay to the financial reporter the following rates, or one-half thereof, to wit: Between the ages of fifty-four and fifty-five, four dollars; that the decedent, at the time of presenting himself to receive the third degree, or degree of manhood, paid to the financial reporter, for the use and benefit of the widows' and orphans' benefit fund, the sum of two dollars, the same being one-half of an assessment, and entitling the beneficiary named by the decedent to the sum of one thousand dollars out of said fund upon his death, for which sum he directed a certificate to be issued to himself for the benefit of the plaintiff; that at and prior to the time the decedent became a member, said defendant had prepared and printed blank benefit certificates to members, the full-rate certificates having therein the words 'two thousand dollars,' and said half-rate certificates having printed therein the words 'one thousand dollars;' that the officer and agent of said department, in issuing the said benefit certificate to the said Columbus V. Gray, by inadvertence and mistake, used a full-rate blank, containing the words 'two thousand' instead of 'one thousand dollars,' which said deceased had contracted for and directed to be issued to him; that said decedent, by inadvertence and mistake, received and accepted said certificate containing said words 'two thousand' instead of 'one thousand dollars.' And it is further averred that all of the dues, assessments, fines, etc., paid to said defendant by or on behalf of said decedent to keep him in good standing during his said membership, as well as the assessment fees and dues paid by him upon his initiation,

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were paid by said decedent, and the only interest ever had or held by the plaintiff in and to said certificate, or the benefits to be paid thereon, she received and held as the voluntary grantee of said decedent, and not otherwise."

The allegations in this paragraph show that the appellee issued two classes of benefit certificates ; that when a member was admitted to a certain degree in the organization he was entitled, upon the payment of four dollars, to a certificate for two thousand dollars, and on the payment of two dollars he was entitled to a certificate for one thousand dollars ; that the decedent, on being admitted to the degree, paid two dollars and contracted for a benefit certificate of one thousand dollars to be issued to him, payable to his wife upon his death. It also alleges that by inadvertence and mistake the officer executed to the decedent, and he received and accepted, a certificate for two thousand, instead of one thousand, dollars. The allegations clearly show such a mutual mistake as may be corrected between the original contracting parties. It is contended by counsel for appellant that the mistake is not mutual ; that it only appears to be the mistake of the appellee's agent and officer issuing the policy or certificate. The answer avers a mistake on the part of the decedent ; it avers that the decedent paid two dollars, entitling him to a certificate for one thousand dollars, and that he directed a certificate to be issued to himself for the benefit of appellant. There is a further averment, that the agent issued a certificate for two, instead of one, thousand dollars, which said decedent had contracted for and directed to be issued to him. Conceding the truth of the averments in this paragraph of answer, which are admitted by the demurrer, one of two things must be true, either that the decedent by mistake received and accepted the certificate for two thousand dollars, believing it to be for one thousand dollars, which he had contracted for, or that he knew of the mistake on the part of the appellee's agent and with such knowledge received and kept the certificate ; and in either event the appellee is enti-

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tled to a reformation. In the case of *Roszell v. Roszell*, 109 Ind. 354, the court says: "The agreement having been satisfactorily established, if it appears that the mistake was known to one of the parties, who, with knowledge of the ignorance of the other, nevertheless kept silent when he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement."

When persons are dealing together, and have entered into a contract, and in reducing the contract to writing, or in executing or performing the same, one person makes a mistake which is known to the other, it is the duty of the person having knowledge of the mistake to inform the other at the time, and this is true regardless of whom the mistake favors. It would hardly be urged by counsel for appellant that if the decedent had paid for a certificate for two thousand dollars, and contracted for it, and directed that it should issue to him, and he had paid dues and assessments on a certificate for two thousand dollars, but it had been issued to him for one thousand dollars by mistake, and that the decedent had received the certificate supposing and believing it was for two thousand dollars, when in fact it was only issued for one thousand, the appellee could defend against the correction of such mistake by admitting that the policy was to be for two thousand; that the decedent had paid the amount entitling him to a certificate for two thousand, and believed he had received a certificate for that amount, but that the agent of appellee had purposely and intentionally issued the certificate for one thousand dollars. *Keister v. Myers*, 115 Ind. 312.

It is urged that the policy can not be corrected as against the appellant, the beneficiary named in the policy; that she occupies the position of an innocent purchaser for value; that the husband, in procuring the certificate to be issued in her favor and for her benefit, did so in discharge of an obligation to provide for his wife, and that she has an interest in the policy from the date it issues; that she is a party to the con-

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tract, and that it can not be corrected without alleging and proving that she was cognizant of the mistake. We do not think this theory can be upheld. Even if it be admitted that she is a party to the contract and has an interest in it from the time the certificate was issued, yet the decedent, the husband, acted for her and as her agent, to a certain extent, in making the contract, and a mistake can as well be corrected against her as against the principal in any other contract made by an agent. It could not be contended, we think, if the husband, in dealing with another person, had owing to him one hundred dollars, and by mistake took the person's note for two hundred dollars, and afterwards gave the note to his wife, that the mistake could not be corrected; or that, if in the settlement the note had been, by the direction of the husband, made payable to the wife, the mistake could not be corrected. The case of *Roszell v. Roszell, supra*, supports this doctrine, and we think any other rule would be unjust and inequitable. The demurrer was properly overruled to this paragraph.

The second paragraph alleges that it was the duty of every full-rate member to pay four dollars dues on each assessment of which he was notified, and on failure to pay such assessment within thirty days after notice, they stood suspended, and forfeited the right of recovery on the policy, and that the decedent had wholly failed and neglected to pay such assessments within thirty days after having been duly notified, by reason of which failure he had been suspended, and forfeited the right of recovery on the policy.

It is contended that this paragraph is not good, for the reason that it only avers that the decedent did not pay the assessments, and does not allege they were not in fact paid. This objection is not well taken. There was no other person under any obligation to pay such assessments, and the allegation that he failed to pay is sufficient. It will not be presumed that some other person, not liable, has paid such assessments, and if they had been paid by any other person, it

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is proper matter to be pleaded in reply to the answer. There was no error in overruling the demurrer to the second paragraph of answer.

The remaining error assigned is the sustaining of the demurrer to the second paragraph of plaintiff's reply.

The first paragraph of reply is a general denial. The second paragraph is a reply to the first paragraph of answer. It alleges that appellant had no knowledge of defendant's laws; that upon the faith that in the event of the death of her husband she would receive two thousand dollars, she borrowed of one Parish sixty dollars, and paid the assessments due the defendant on account of said contract of insurance; that before she had any knowledge of said alleged mistake, and while relying upon said contract, and expecting to receive said sum of two thousand dollars, she contracted debts and expended money in purchasing a lot in the cemetery and a picture of decedent, the borrowed money in all amounting to over three hundred dollars, which she would not have contracted nor expended in so large amounts had she had knowledge or notice of said alleged mistake.

Some of the conditions stipulated in the certificate, and upon which the payment depends, are: "That said member comply with the laws, rules and regulations now governing the order, or that may be hereafter enacted for its government, and is in good standing at the time of his death, the said supreme lodge hereby agrees to pay, out of the widows' and orphans' benefit fund, to his wife, Susannah Gray, the sum of two thousand dollars."

By the terms of the by-laws it is provided, and so alleged in the answer, that the sum to be paid by a person of the age of the decedent, to entitle him to the payment to a beneficiary named of the sum of two thousand dollars, is the sum of four dollars on each assessment, or two dollars on each assessment to entitle the beneficiary to one thousand dollars at the death of the member. It is a well settled principle that the by-laws of such benevolent associations as

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the appellee enter into and become a part of the contract of insurance, even though there was no reference to them in the certificate; but in this case there was a reference to, and an express agreement to comply with, the terms and conditions of the laws of the appellee. *Holland v. Taylor*, 111 Ind. 121; *Bauer v. Samson Lodge, K. of P.*, 102 Ind. 262; *Supreme Lodge, K. of P., v. Knight*, 117 Ind. 489. Therefore, in construing this contract between the appellee and the appellant, the beneficiary named in the certificate, we must regard the contract as having incorporated into it the by-laws of the association; and when we so consider, there is incorporated in the contract an agreement that to entitle the beneficiary to two thousand dollars on the death of the member, such member must pay to the association four dollars on becoming a member of the manhood degree, and four dollars on each assessment; and that if the member only pays two dollars upon entering such degree, and on each assessment thereafter, the beneficiary named by him shall only be entitled to one thousand dollars.

When the beneficiary paid the assessments alleged in the reply to have been paid by her, she had knowledge, and was bound to take notice, of the terms of the contract by which it was stipulated that the payment of two dollars on such assessment only entitled her to one thousand dollars on the death of her husband; and, under the law, she was supposed to know, and bound to take notice of, the terms of the contract, including the by-laws as a part of the same, when she contracted debts or expended money on the faith of the amount she was entitled to receive in the event of the death of her husband.

We think the paragraph of reply clearly bad. There is one further theory urged by counsel. The reply alleges that upon being informed of the alleged mistake, the appellant offered to pay, or allow to be deducted from said sum of two thousand dollars, the additional sum of two dollars on each assessment, and it is claimed that the proper measure of re-

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covery is the sum of two thousand dollars, less the sum of two dollars on each assessment. We can not concur in this theory. If the appellee was entitled to a correction of the contract and to a reduction, the proper remedy was a reformation of the contract, so as to make it speak the truth and carry out the contract as made, and for which a consideration had been paid. When a mutual mistake has been made in reducing a contract to writing, a party, if entitled to relief at all, is entitled to have the contract reformed, so as to speak the truth, and to have it enforced according to the terms as in fact agreed upon. To hold in accordance with the theory of counsel would be to make a new contract for the parties.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 17, 1889.

No. 13,682.

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118	301
162	2:6

SHERIFF'S SALE.—*Sale in Solido.*—*Setting Aside.*—Where a sheriff sells land as an entirety, without offering it in parcels, in violation of a decree adjudging the land to be susceptible of division and ordering a certain part thereof to be first sold in satisfaction of the judgment, the sale is voidable, and may be set aside.

SAME.—*Defects in Sale not Cured by Deed.*—The fact that the sheriff, in executing a deed to the purchaser, includes therein only that part of the real estate which the decree directed to be first sold, does not cure the irregularity in selling the property *in solido*.

SAME.—*Knowledge of Defects.*—*Waiver.*—The owner of real estate judicially

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sold, who does not obtain knowledge of irregularities in the sale until after a deed has been executed to the purchaser, may afterwards sue to set the sale aside, as he can not be presumed to have waived defects of which he had no knowledge.

From the Clark Circuit Court.

J. B. Meriwether, for appellant.

P. H. Jewett, for appellee.

COFFEY, J.—This was a suit by the appellant, in the court below, to set aside a sheriff's sale. The complaint alleges, substantially, that on the 12th day of —, 1883, the appellant executed to Charles R. McBride, guardian, a mortgage on lot number two (2), in block number one (1), in Felter and Meriwether's subdivision of outlots 32 and 33 in the town of Clarksville, Clark county, Indiana, to secure the sum of \$600; that said lot fronts on State street forty-nine and one-half feet, and extends back two hundred and fifty feet to an alley; that on the 12th day of July, 1884, said mortgage was foreclosed in the Clark Circuit Court, and on the 22d day of July, 1884, an order of sale was issued to the sheriff of said county, ordering and directing him to sell said real estate, as lands are sold on execution, to pay said judgment, and also ordering that the north and south halves of said lot be sold separately, the north half to be sold first, without relief from valuation laws, to pay said judgment; that said sheriff duly advertised said lot to be sold on the 16th day of August, 1884, and on said day sold the same to the appellee, Craig; that said sale was not made as directed in said order, or as required by law, and was void for the following reasons: 1. Said sheriff did not offer for sale the rents and profits of said real estate for a term of years not exceeding seven, in parcels and divisions, as required in said order of sale, or as required by law, and did not offer for sale said rents and profits to the north and south halves of said lots separately, but the same was offered for sale as a whole, or entirety; that said lot was susceptible of division into north

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and south halves. 2. Said sheriff did not sell the fee simple of said real estate in parcels, as directed in said order of sale and the judgment of said court, by north and south halves separately, said north half to be sold first ; but at said sale said sheriff offered for sale and sold all of said real estate to said Craig, at once and as an entirety, without any division ; that said real estate was and is susceptible of division into parcels ; that said lot fronts on a street, and has two houses on the north half thereof and extends to a twenty-foot alley, and has two other houses on the south half thereof ; that said sale was made on the 16th day of August, 1884, but no return to said order of sale by said sheriff was made until August 20, 1885 ; that on said date said sheriff executed a deed to said Craig for the north half of said lot under said sale, and by virtue thereof said Craig took possession of said north half, without right and without the consent of appellant ; that the north half of said lot was of the value of \$1,200, and the whole of said lot was sold by said sheriff to the said Craig for the sum of \$425, and the north half thereof deeded as aforesaid ; that appellant was not present at said sale, and had no knowledge or information of any defect, irregularity, mistake or omission made in said sale until the latter part of December, 1885 ; that at the January term, 1886, of the Clark Circuit Court he commenced an action to set aside said sale, and on the trial thereof he dismissed the same, without prejudice, for the reason that the court required averments not contained in the complaint, and this complaint is filed at the next term of said court.

A demurrer for want of sufficient facts was sustained to this complaint, and the appellant refusing to amend, judgment was rendered against him for costs. He assigns the above ruling of the circuit court as error.

It is charged in this complaint, as we understand it, that the decree issued to the sheriff ordered and directed him to sell the real estate therein described in parcels, selling the north half thereof first, and that, in violation of said order, the

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sheriff failed to offer the rents and profits of each parcel separately, and offered and sold the entire lot in fee simple, and not in separate parcels, as ordered by the court.

In the case of *Stotsenburg v. Same*, 75 Ind. 538, it was held that a sale of real estate, as an entirety, which is susceptible of division and sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside. It was formerly held that such a sale was void. *Catlett v. Gilbert*, 23 Ind. 614; *Banks v. Bales*, 16 Ind. 423. It is now held, however, that such sales are not void, but voidable only. *Jones v. Kokomo Building Ass'n*, 77 Ind. 340; *Nelson v. Bronnenburg*, 81 Ind. 193.

In this case, however, the question of the divisibility of the property was not an open one. It was settled by the court rendering the decree, and the sheriff could not exercise any discretion in the matter. It was his duty to follow the commands of the decree, and he had no right to depart therefrom.

It is the duty of the sheriff, in all cases, to offer the land in separate parcels, if it is susceptible of division, and a failure to do so will avoid the sale. *Voss v. Johnson*, 41 Ind. 19; *Tyler v. Wilkerson*, 27 Ind. 450; *Reed v. Diven*, 7 Ind. 189; *Wright v. Yetts*, 30 Ind. 185; *Piel v. Brayer*, 30 Ind. 332; *Bardeus v. Huber*, 45 Ind. 235.

Where the land consists of two or more separate parcels it is the imperative duty of the sheriff to offer it in separate parcels. *Brake v. Brownlee*, 91 Ind. 359; *Gregory v. Purdue*, 32 Ind. 453.

This case does not fall within the rule laid down in *Nelson v. Bronnenburg*, *supra*. It is alleged in the complaint in this case that the sheriff withheld the return for more than a year after the sale, that appellant was not present at the sale, and had no knowledge of the irregularities of which he complains until a short time before the commencement of this suit. He can not be presumed to have waived defects of

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which he had no knowledge. *Fletcher v. McGill*, 110 Ind. 395.

Nor does it help the case to say that the sheriff only made a deed to the north half of the lot. If the property was offered for sale or sold in a manner different from that prescribed in the decree, such irregularity may be presumed to have deterred bidders, and we are unable to say that the appellant was not injured. We think the complaint states a good cause of action.

For the error of the circuit court in sustaining the demurrer of the appellee to the complaint the judgment must be reversed.

Judgment reversed, with directions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed April 18, 1889.

No. 14,473.

THE PENNSYLVANIA COMPANY v. STEGEMEIER, ADMINISTRATRIX.

DEMURRER TO EVIDENCE.—*Effect of.*—By demurring to the plaintiff's evidence the defendant admits the truth of all the evidence adduced by the plaintiff, and all inferences that may reasonably be drawn from it, and withdraws from consideration all favorable evidence, except upon points where there is no conflict.

RAILROAD.—*Street Crossing.*—*Failure to Close Gates or Give Warning.*—*Negligence.*—Where a railroad company, in pursuance of a city ordinance, has erected gates and stationed a watchman at a street crossing, a traveller who approaches the crossing and finds the gates open and receives

118	305
123	319
118	305
126	508
118	305
128	520
118	305
132	193
118	305
143	168
118	305
152	350
118	305
156	368
156	372
118	305
163	256

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no warning from the watchman, has a right to assume that there are no approaching trains, and if, acting upon this assumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, and in the confusion caused by the unexpected danger into which he is thus led is struck and killed, the railroad company is liable.

From the Allen Circuit Court.

J. Brackenridge and *M. L. Graff*, for appellant.

H. Colerick, *W. S. Oppenheim* and *P. B. Colerick*, for appellee.

ELLIOTT, C. J.—The appellee, in her complaint, alleges that the appellant was required by an ordinance of the city of Fort Wayne to keep a flagman to give warning to travelers at the crossing of its railroad track and Hanna street, a public street of that city; that it had erected gates at the crossing, and had stationed a flagman there; that appellee's intestate went upon the crossing and was struck and killed by one of the appellant's trains; that the gates were open at the time, and the flagman was in his shed; that no warning was given, and that the intestate was free from contributory negligence.

The appellant demurred to the evidence. The rules upon the subject of demurrers to the evidence are well settled, and by them this case must be determined. By demurring to the evidence the appellant admitted the truth of all of the evidence adduced by the appellee, and all inferences that might reasonably be drawn from it, and withdrew from consideration all favorable evidence, except upon points where there was no conflict. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250, and cases cited. The question, therefore, as the record presents it, is this: Does the evidence, considering only that which is favorable to the appellee, and awarding her the benefit of all reasonable inferences for which it supplies a foundation, establish the cause of action stated in her complaint?

The appellee testified that she was the widow of the in-

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testate, gave the names and ages of his children, stated his business and the time of his death, and said that he was forty years of age. She also testified that he had lived in Fort Wayne for many years, not far from the crossing where he was killed. John Wingate testified that he saw the deceased running down Hanna street about daylight on the morning of March 2d, 1886, and that he saw him on the crossing, and saw, also, the head-light of an approaching train not more than six or eight feet distant from him. The witness then lost sight of the deceased, and after the train passed he saw the switchman come out of his shed and walk back up the track, and he, the witness, joined him. They found the deceased lying not far from the track, and, taking him up, they carried him to the sidewalk. Louis Deggetts testified that the name of the appellant's watchman at the Hanna street crossing on the 2d of March, 1886, was Patrick Keith, and that at the time the appellant's train passed on that morning Keith was in his shed. Charles Newell, in his testimony, said that he was the engineer of the No. 5, or limited, train of the appellant; that the gates of the crossing were up when his train passed on the morning of the 2d of March. This witness also testified that he saw a man on the track looking up at a train, and that he gave three sharp blasts of the whistle; that he did not again see him, nor did he know that the man was hurt until some minutes afterwards, when he found a man's cap on his engine. The crossing was proved to be within the corporate limits of the city of Fort Wayne, and an ordinance of the city was given in evidence which contained a provision requiring the appellant to keep a flagman at the crossing of Hanna street. It was also proved that train No. 5 passed that crossing about the time the appellee's intestate was struck, that the gates had been in use at the crossing for four or five years before the accident, and the manner in which they were operated was explained. It was admitted that the deceased was struck by train No. 5, and that it was one of the appellant's trains. There was also ev-

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idence showing that train No. 5 was moving west on the appellant's track, and that train No. 6, belonging to the Wabash Company, was at almost the same instant moving to the east on a track a few feet distant from that on which the appellant's train was moving. These tracks were laid from east to west, and were crossed by Hanna street, running north and south, at right angles.

The appellant's counsel say in argument that "It was the duty of the company to keep a flagman at this crossing, and it was also the duty of the defendant to have the gates down when a train was passing over the crossing. The evidence shows that the flagman was not at his post, and that the gates were not down when the train, whose engine it was claimed killed the intestate, was about to pass over the crossing. It may, therefore, on demurrer to the evidence, be assumed that the company was guilty of negligence." This statement of appellant's counsel narrows the investigation to a single question, and that is this: Is there evidence from which it may be reasonably inferred that the appellee's intestate was not guilty of contributory negligence?

The appellant's counsel, it is true, argue that there is no evidence that Stegemeier was struck by train No. 5, but in assuming that there was no such evidence counsel are in error, for it was expressly admitted on the trial "that the track that train No. 5 was running on at the time (the time of this accident) was the property of the defendant, and that the said train was operated by the Pennsylvania company, the one that hit William Stegemeier."

The appellant was in the wrong in not obeying the ordinance of the city. This is, as we have seen, conceded by counsel, and there can be no doubt that the proposition we state embodies the law. *Wanless v. N. E. R. W. Co.*, L. R. 6 Q. B. 481 (L. R. 7 H. L. Cas. 12); *Railway Company v. Schneider*, 45 Ohio St. 678; *Baker v. Pendergast*, 32 Ohio St. 494. An ordinance of a municipal corporation is a local law, and binds persons within the jurisdiction of

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the corporation. *Town of Elwood v. Citizens' Gas, etc., Co.* 114 Ind. 332; *Blanchard v. Bissell*, 11 Ohio St. 96; *State v. Lee*, 4 Crim. Law Mag. 79, 81; 1 Dill. Mun. Corp. (3d ed.), sec. 307; *Madison, etc., R. R. Co. v. Taffe*, 37 Ind. 361; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Simons v. Gaynor*, 89 Ind. 165.

The effect of the appellant's failure to obey the local law extends much farther than the question whether it was or was not guilty of actionable negligence, for it exerts an important influence upon the question whether the intestate was or was not guilty of contributory fault. The evidence shows that he was, and long had been, a citizen of Fort Wayne; and it also shows that he was acquainted with the Hanna street crossing. The reasonable inference, therefore, is that he knew that when trains were about to pass the crossing the gates were shut down, or warning given by the flagman. But more than this, he had a right, within reasonable limits, to act upon the presumption that the company had done its duty and obeyed the law. He had no right, however, to recklessly omit to use his senses of sight and hearing, and rely entirely upon this presumption; but he did have a right to presume that there were no approaching trains. But here there is no evidence that he did not use his senses, as a prudent man would have done under the circumstances in which he was placed; on the contrary, there is evidence from which it may be reasonably inferred that he was not guilty of contributory negligence. It is a familiar rule that a man brought into danger by the wrong of another is not bound, when confronted by sudden and unexpected peril, to act with coolness and deliberation. The law recognizes the influence which unexpected exposure to danger exerts upon ordinary men, and does not demand of them the prudence and care that men would exercise under other circumstances. 2 Shear. & Redf. Negligence (4th ed.), section 477. Here the failure of the company to obey the local law gave the deceased assurance that the tracks were

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clear and the crossing safe ; but when he had gone upon the crossing he found two trains rapidly approaching him, one from the east and one from the west, and the fact that he met his death by being struck by one of them does not authorize the inference that he was guilty of such contributory negligence as bars a recovery, for he was thrown off his guard and exposed to a sudden danger that he had a right to expect would not be encountered. If he had carelessly gone upon the track, or had gone upon the track at a crossing where there were no gates or no flagman required, we should have a very different case ; but he was not negligent in going upon the tracks, because he was justified in believing that there were no approaching trains. It was the act of the appellant, and not his own, which created this belief. It was through no fault of his that he entered a place of danger. The case at bar is to be discriminated from those in which the injured person enters upon a track where there is no affirmative assurance of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of safety, upon which a citizen might act without being chargeable with negligence. This case is essentially unlike one where the only negligence is the mere failure to sound a whistle or ring a bell, for here the assurance was that there was no train near the crossing. This assurance constitutes the distinctive feature of this class of cases, for the reason that it is in the nature of an invitation to cross, and of a declaration that there are no approaching trains. This essential feature clearly marks the case and distinguishes it from such cases as *Chicago, etc., R. W. Co. v. Hedges, ante*, p. 5.

The case before us belongs to the class in which railroad companies are held responsible because they put the traveller off his guard and lure him into danger. The general rule upon this subject is thus stated by one of our text-writers : “ Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to

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the necessity for looking or listening for the approach of a train, he can not as a matter of law be said to be guilty of negligence *per se* for neglecting to do so. Thus, where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross, and if the company neglects its usual duty, and does not close them, or otherwise notify travellers of the approach of a train, it can not relieve itself from liability simply because the traveller neglected to look or listen for himself." 2 Wood Railway Law, 1328.

It is said in another text-book, that: "Yet, where a railroad company is under no original obligation to station a flagman at a particular crossing, if it has done so for many years, travellers have a right to presume, in case of his absence, that the road is clear. So they have, where the company is legally bound to keep a man at the crossing, though the obligation be created only in favor of other persons." 2 Shear. & Redf. Negligence, section 466.

In the case of *Railway Co. v. Schneider*, 45 Ohio St. 678, the Supreme Court of Ohio said: "It is the business of the gatemen to watch the track, and when clear, to open the gates for persons using the street to cross; and, upon the approach of locomotives or trains, to close the gates and prevent persons and vehicles from crossing until the tracks are again clear. To persons in the street who are approaching the railroad tracks with a view to crossing, an open gate is notice that the track is clear, and that it is safe to cross." It was said, by TREAT, J., in *Central Trust Co. v. Wabash, etc., R. W. Co.*, 27 Fed. Rep. 159, that: "At the crossings in a populous city, where gates and watchmen are provided, passengers and pedestrians have a right to suppose when the gates are opened, and no warning to the contrary given by the watchmen, that they can proceed with entire safety. If accidents should happen through the gross negligence of the manage-

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ment of the gates by the watchmen connected therewith, *prima facie* the railway company must answer for the damages sustained. Trifling matters as to the movements of the passenger or pedestrian in crossing, under such circumstances, can not exonerate the railway company, whose duty it was to protect said crossing, and give warning as to the safety thereof." In *North Eastern R. W. Co. v. Wanless*, L. R. 7 H. L. Cas. 12 (L. R. 6 Q. B. Div. 481), it was said: "It appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the fact that the gates were open. Then, when inside the gates, the boy who in this case was injured, saw what was inconsistent with the gates being open, namely, he saw one train passing, and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way, he failed to see the other train." The reasoning of the judge from whom we quote forcibly applies to this case. The deceased was not simply thrown off his guard, but he was also assured that there were no approaching trains, and this assurance dispensed with the vigilance that under other circumstances would have been required of him; this assurance, too, completely relieved him from the imputation of negligence in going upon the tracks, and the evidence of the approach of the trains from opposite directions an instant after he entered on the tracks, supplies sufficient ground for the inference that his failure to see and avoid the train was attributable to the confusion produced by the sudden peril to which the wrong of the company had inexcusably exposed him. There are many decisions supporting the doctrine we have asserted, but we deem it necessary to cite only a few of them. *Chicago, etc., R. R. Co.*

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v. *Boggs*, 101 Ind. 522; *Greany v. Long Island R. R. Co.*, 101 N. Y. 419; *Owen v. Hudson, etc., R. R. Co.*, 35 N. Y. 516; *Beisiegel v. New York, etc., R. R. Co.*, 34 N. Y. 622; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285; *Chicago, etc., R. R. Co. v. Hutchinson*, 120 Ill. 587.

Judgment affirmed.

Filed April 18, 1889.

No. 13,669.

CAMPBELL v. PENCE.

PARTNERSHIP.—Agreement.—Limitation of Interest.—Rights of Third Persons.

—A partnership agreement, whereby the money and property used and accumulated in the course of the business of the firm belong exclusively to one partner, the other member to receive as compensation for his services a share of the profits merely, is not only valid between the partners, but is also binding upon persons who deal with the profit-sharing member, with knowledge of the facts.

SAME.—Township Trustee.—Settlement with Predecessor.—Receiving Check upon Funds of Third Person.—Liability.—A township trustee who, upon a settlement with his predecessor in office, with knowledge of the facts, receives from him a check, drawn in the name of the latter's business partner, against a fund belonging to such partner, and which the drawer is authorized to use only for matters pertaining to the partnership business, is liable, in a suit brought against him in his individual capacity, to the owner of the fund for the amount so received.

From the Madison Circuit Court.

C. L. Henry and *H. C. Ryan*, for appellant.

M. S. Robinson, *J. W. Lovett*, *D. C. Chipman* and *M. A. Chipman*, for appellee.

OLDS, J.—The averments in the complaint in this action

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are substantially as follows : That between the 11th day of July, 1884, and the 1st day of June, 1885, the plaintiff and one Elijah J. Walden, then in life but since deceased, were engaged in the business of buying and shipping grain, in the city of Anderson, Indiana, by the name and style of Walden & Pence ; that plaintiff furnished all the money to carry on said business ; that the money was deposited by plaintiff in the Citizens' Bank of Anderson, in the name of the plaintiff and subject only to his individual check, and was only to be checked out and used to pay for grain and the necessary expenses of said business ; that said Walden furnished no means at any time to be used in said business, but was to assist in carrying on said business by devoting his time and labor thereto, and was authorized to check out of said funds to pay for grain and the necessary expenses of said business, and for no other purpose whatever ; that for such service said Walden was to receive one-half of the net profits, if any, arising out of said business, and no other compensation or interest ; that the money furnished by plaintiff and that received in the course of the business was the individual property of said plaintiff ; that at divers times between said dates the defendant, well knowing all of the above facts, received from said Walden checks on plaintiff's said account and funds which had been so deposited in said bank, from time to time, in the course of said business ; that said checks were signed in the individual name of said plaintiff ; that the defendant accepted said checks and wrongfully drew thereon at divers times the sum of six hundred and twenty-five dollars of plaintiff's money, and wrongfully and unlawfully converted the same to his own use and benefit, and deprived the plaintiff thereof, for the alleged payment of the individual indebtedness of said Walden, and not for the payment of any claim or demand against, or for any indebtedness of, the plaintiff or arising out of said business of buying and shipping grain ; a bill of particulars of said sums so converted is filed with the complaint, marked " Exhibit A," and made

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a part of the same. It is further averred that the defendant well knew, at the several times he received said checks and drew the money thereon and converted the same to his own use, that the same was the individual property of the plaintiff, and that said Walden had no right to draw on the same for the payment of his own debts, or for any purpose other than to pay for grain and the necessary expenses of said business. It is further averred that said checks were drawn by Walden, and said funds received and converted by the defendant, without the knowledge or consent of the plaintiff, and that he never acknowledged or ratified the same in any manner; that said sums are all due and unpaid, and defendant has failed and refused to pay the same or any part thereof. Prayer for judgment.

The defendant answered in two paragraphs; the first is a general denial, and the second is substantially as follows: That at the April election in 188—, the said Elijah Walden, mentioned in plaintiff's complaint, then in full life but now deceased, was elected township trustee for Anderson township, in Madison county, in the State of Indiana; that said Walden then and there duly qualified as such trustee by giving bond, taking the oath of office, and entering upon the discharge of his duties as such trustee, and continued to act as such until his term of office expired; that the defendant herein was duly elected on the first Monday in April, 188—, as the successor to the said Walden; that he duly and legally qualified as such township trustee for said Anderson township as aforesaid, and entered upon the discharge of his duties as the successor in office of said Walden; that afterwards the said defendant received from the said Walden, as his predecessor in office, the said sums of money mentioned in the plaintiff's complaint as moneys belonging to and due Anderson township, and remaining in the hands of said Walden; that he received the same as the trustee of said township, and in no other capacity whatever.

To the second paragraph of answer plaintiff filed a de-

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murrer, which was sustained, and the ruling of the court in sustaining the demurrer is assigned as error.

It is contended by appellant that this paragraph of answer shows the money to have been received by appellant as trustee of Anderson township from his predecessor in office, as the money due the township, and that he received the same as trustee of said township, and in no other capacity ; that the plaintiff's cause of action, if he has any, is against Anderson township, and not against appellant as an individual.

We can not agree with the theory of the counsel. It was the duty of appellant to collect of his predecessor the amount due the township, and, if need be, to bring suit upon his bond, and when collected, the technical, legal title to the money would be in the appellant.

It has been repeatedly held by this court that a township trustee is more than a mere bailee of the money which comes into his hands by virtue of his office ; that he is a debtor to the State, for the use of those directly interested. *Rowley v. Fair*, 104 Ind. 189 ; *Linville v. Leininger*, 72 Ind. 491.

The complaint alleges that the money paid by Walden to appellant was the individual money of appellee, out of which Walden had no right to pay the debt due from him to the township ; that appellant received the money knowing at the time he received the same that it was appellee's money, and Walden had no right to pay it to him ; that the appellant wrongfully and unlawfully received and converted the same to his own use. It is not a good defence to the complaint to allege that appellant received the money from Walden in discharge of his indebtedness to the township, and that he received the same as trustee for the township, and in no other capacity, without controverting the facts alleged in the complaint, that the money he received was the individual money of appellee, and Walden had no interest in it, or right to pay it out in discharge of his individual indebtedness, and that appellant had full knowledge of such facts at the time he so re-

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ceived the same and converted it to his own use. All the appellee was required to allege and prove was the wrongful and unlawful payment by Walden to appellant out of appellee's individual money, and that appellant had knowledge that the money so paid was the money of the appellee, and was paid to him without authority. Appellee was not required to ascertain and allege in his complaint and prove in what capacity appellant received the money. To constitute a good answer to the complaint, it was necessary to allege facts showing the right of Walden to use the money in payment of the debt he owed to the township, or such a state of facts as would estop the appellee from recovering it back. The demurrer was properly sustained to the second paragraph of answer.

The only remaining error assigned and argued is the overruling of the appellant's motion for a new trial. It is contended by counsel for appellant that the evidence does not support the verdict. This requires the court to again say that this court will not weigh the evidence; that where there is evidence tending to support the verdict this court will not interfere and reverse the judgment, although it may seem that the evidence preponderates against the verdict. The weight of the evidence is wholly a matter for the lower court.

The difficulty in this case is that the counsel for appellant had one theory and counsel for appellee another, and the jury found the theory of the appellee to be correct. Appellant contends that appellee and Walden had been in partnership for years, and during all that time Walden was township trustee, and that they used the township funds in the business, and repeatedly checked from the firm account kept in the name of appellee to pay back township funds; that appellant was the bookkeeper of the firm, and, knowing of the custom of the firm to use trust funds in the business, and to check from the account kept in the name of appellee to repay

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trust funds used by Walden, he accepted the checks so given by Walden in payment of the amount Walden owed the township. But it was contended by appellee that, after appellant was elected trustee, appellee and Walden had a settlement of their partnership, in June, 1884, and then commenced business on a new basis, by which appellee was to furnish all the funds for the business, and did furnish the same, and it was deposited in bank in the individual name of appellee, with the express understanding and agreement that it should only be checked out to pay for grain and the necessary expenses of the business, and that appellant had full knowledge of this latter partnership and agreement at and before the times he received the checks and drew the money upon them. This is the theory of the complaint, and there is evidence tending to support this theory and the verdict in the case.

It is alleged in the complaint, and there is evidence tending to support the allegation, that the appellee furnished all the capital in the business, and that it was expressly agreed between appellee and Walden that the original amount put in the business, and the amount received in the course of the business, should all belong to and be the property of the appellee, and that the said Walden should receive as compensation for his services the one-half of the net profits. There can be no doubt but such a contract was valid and binding between appellee and Walden, and Walden could have acquired no title to any part of the funds except the one-half of the profits, if there were any profits. That being true, it would also be binding upon any person who had full knowledge of such agreement between appellee and Walden. If the money belonged to appellee, and appellant knew it, he could have acquired no interest or title to the money by its being paid to him by a person who he knew at the time had no right to pay it to him. *Bartlett v. Jones*, 49 Am. Dec. 606 ; *Parsons Partnership* (3d ed.), p. 48 ; *Story*

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Partnership (5th ed.), pp. 41, 43; *Jackson v. Crapp*, 32 Ind. 422.

The complaint shows that Walden is dead, and that dispenses with the necessity of making him a party, even if it would be necessary to make him a party if living; the complaint shows the action to be brought by the survivor. In the case of *Bromley v. Elliot*, 38 N. H. 287 (75 Am. Dec. 182), the court says: "If one person advances funds, and another furnishes his personal services and skill in carrying on a trade, and is to share in the profits, this constitutes a valid partnership; neither is it essential to a partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans, or farmers, as well as between merchants. It may as well exist between factors and brokers, or agents, whose sole employment relates to the property and business of third persons, as among those who jointly own the property in which they deal. There can be no valid reason why, in such case, the ownership of the goods in which a partnership deals, should not belong to one of the partners exclusively, just as well as it might to a stranger, without in any way affecting the validity of the partnership. The essence of the contract is that they should be jointly concerned in profits and loss, or in profits only, in some honest and lawful business—the relation of partners being established by the fact that they share the profits between them. They are bound as partners to third persons, by all agreements within the apparent scope of the business in which they are engaged, unless the limitations of their contracts are known to those with whom they deal, or are such as from the facts known to them, they are bound to inquire." This authority supports the doctrine that all the property with which the partners deal may be owned by one partner, and that persons having knowledge of the terms of the partnership and ownership of the property would be bound by the terms of the partnership.

Burns *et al.* v. Gavin.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 18, 1889.

118	320
118	328
118	320
125	453
126	503
118	320
130	424

No. 13,532.

BURNS ET AL. v. GAVIN.

VOLUNTARY ASSIGNMENT.—*Sale of Real Estate by Assignee.*—*Liability for Taxes.*—The assignee of an insolvent debtor is not liable to pay taxes due upon land sold by him, unless ordered by the court having jurisdiction of the insolvent's estate to sell the land discharged of liens.

JUDGMENT.—*When Conclusive upon One not a Party.*—One who employs counsel and procures a matter to be litigated in the name of another, who is only nominally interested, is concluded by the judgment rendered in that case upon the matter in question.

From the Decatur Circuit Court.

J. S. Scobey, for appellants.

J. D. Miller and *F. E. Gavin*, for appellee.

MITCHELL, J.—This was an application by Burns and others for a mandate to compel Gavin, as assignee of Gillespie, an insolvent debtor, to pay certain taxes on real estate which had been transferred by deed of assignment, and sold and conveyed by the assignee, under the order of the court, to the plaintiffs. The latter claimed that it was the duty of the defendant, as assignee, to discharge the land from the tax lien out of the funds in his hands.

The assignee answered, in substance, that the plaintiffs purchased the several tracts of land mentioned at stipulated prices, and that he executed deeds to them under the order

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and direction of the court, without any covenants of warranty, and that he had in no wise agreed to pay the taxes, and that it was not legally incumbent on him to pay them. He answered further, that the plaintiffs, after the sale and conveyance mentioned, for the purpose of having the question of the defendant's liability as assignee to pay the taxes judicially determined, had employed competent counsel, and had procured the county treasurer of Decatur county to file a petition in the Decatur Circuit Court, in which the insolvent's estate was pending for settlement, asking the judge thereof to order and adjudge that the taxes should be paid out of the assets of the estate. It is averred that the assignee appeared to the petition and denied the liability of the estate, and that upon due consideration it was adjudged by the court that the estate was not liable, and that such judgment remains in full force. The question for decision involves the propriety of the ruling of the court in overruling a demurrer to the answer.

Leaving out of view any question concerning the availability of the remedy resorted to by the plaintiffs, and whether or not an individual can maintain a proceeding for a mandate except in the name of the State, and waiving the consideration of other questions which do not go to the merits of the controversy, it is sufficient to say the ruling of the court in overruling the demurrer to the answer was clearly right, upon two grounds: (1) An assignee who sells and conveys real estate, under the statute regulating voluntary assignments, does not warrant the title, nor does he, without an express agreement to do so, made by the order of the court, assume the payment of liens or encumbrances on the land sold. The statute, in express terms, declares that property assigned, on which there are liens or encumbrances, may be sold subject to such liens and encumbrances. Section 2674, R. S. 1881. A purchaser of real estate who takes a conveyance from an assignee, is in the same position, in respect to liens and en-

cumbrances existing thereon, as is one who purchases at an execution sale, or at a sale made by an executor or administrator. Unless otherwise ordered by the court, he takes the land subject to all prior encumbrances. Presumably, the price agreed to be paid was the value of the land, less the amount of the encumbrances. *Bunch v. Grave*, 111 Ind. 351; *Loudon v. Robertson*, 5 Blackf. 276; *Boaz v. McChesney*, 53 Ind. 193; *Martin v. Beasley*, 49 Ind. 280; *Wood v. Winings*, 58 Ind. 322.

Section 6443, R. S. 1881, which makes it the duty of executors, administrators, guardians, receivers, trustees, and other persons having charge of trust property, to pay the taxes due on the property in their hands, has no application to property after it has been sold to a purchaser who took it presumably subject to the tax lien.

(2) The answer shows that the matter in controversy has been adjudicated. It appears that a controversy had arisen between the plaintiffs and the assignee concerning the liability of the latter to pay the taxes now in dispute, and that the plaintiffs and others employed counsel and procured the matter to be litigated to judgment in the name of the county treasurer of Decatur county. The plaintiffs having, through counsel employed by themselves, litigated the matter once, although in the name of one who was only nominally interested, they are concluded by the previous judgment from again agitating the same questions. *Palmer v. Hayes*, 112 Ind. 289, and authorities cited.

There was no error in the ruling of the court.

The judgment is affirmed, with costs.

Filed April 18, 1889.

 Millikan v. The City of Lafayette.

No. 13,683.

MILLIKAN v. THE CITY OF LAFAYETTE.

118	323
123	396
118	323
125	453
118	323
131	158

TAXES.—*Invalid Sale.*—*Reimbursement of Purchaser.*—*Governing Statute.*—A proceeding, brought after the tax law of 1881 went into force, by a purchaser at a city tax sale made under the law of 1872, wherein the plaintiff seeks to be reimbursed from the city treasury for the taxes paid by him, is governed by the law of 1881.

SAME.—*When Purchaser Entitled to Reimbursement.*—*Description of Land.*—*City.*—*Judgment.*—*Conclusiveness of.*—The right of a purchaser to be reimbursed from the public treasury for taxes paid by him, on account of uncertainty in the description of the land sold, only exists where the description is so indefinite as to fail to carry a lien; yet if the description is not of this character, but an action is brought by the owner of the land against the city treasurer and the purchaser, and defended by the city, wherein it is decreed that the purchaser acquired no lien, and his certificate is cancelled and the plaintiff's title quieted, the city is concluded by the judgment, and the purchaser is then entitled to be reimbursed, under section 6487, R. S. 1881.

From the Tippecanoe Superior Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.

W. C. L. Taylor, for appellee.

BERKSHIRE, J.—The complaint states the following facts: On the 18th day of February, 1880, there appeared on the tax duplicate of the city of Lafayette, and upon the delinquent tax list thereof, then in the hands of Collins Blackmer, the treasurer of said city, in the name of O. H. Temple, and opposite to his name on said duplicate and delinquent list, the following description of real estate, to wit: "80x143 ft. in Wilson's addition in S. 29, T. 23, R. 4," which name and description were and had been so placed upon said duplicate and delinquent list by the officers of the said city whose duty it was to make out the same, and such name and description had been so placed, as alleged, as other names and lands had been placed upon said duplicate, in order to indicate who was

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the owner, and whose property or real estate was liable for taxation in said city, and to enable the treasurer of said city to make the proper collection of taxes that appeared upon said duplicate and list; and at such time, by said duplicate and list, said Temple appeared to be the owner of said real estate as above described; and it further appeared by said duplicate and list, that there was due and unpaid taxes to said city from said Temple, on account of said real estate, in the sum of \$297.34, and which taxes appeared to be delinquent for the years 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878 and 1879. From the 9th to the 11th day of February, 1880, the treasurer of said city had and held a public sale of lands, at the door of the court-house in said city, which had been returned delinquent for non-payment of taxes, for the year 1879 and former years, and, among other lots and lands within the limits of said city, he offered for sale that in the name of said Temple, as above described, and there being no bid therefor, the same was forfeited to the city, and on the 18th day of the same month, said tax being still unpaid, the appellant bought the same of the said treasurer at private sale, and paid therefor \$297.74, which included taxes, interest, costs, penalties and charges due against said real estate, as the same appeared on the said duplicate on the day said real estate was offered for sale at public sale; that the treasurer executed to the appellant a certificate of purchase for said real estate by the following description: "80x143 feet south of Wilson's addition to the city of Lafayette, being land attached to said city in sect. twenty-nine (29), town. twenty-three (23) north, of range four (4) west, the same being more definitely described as follows: Beginning at the southwest corner of lot number three (3), in R. P. Wilson's addition to the city of Lafayette, thence south parallel with Ohio street 82 feet, thence west to the State road, running where Wabash street, if extended, would run, supposed to be one hundred and forty-three (143) feet, thence north along the east line of said State road eighty-two (82) feet, thence

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to the place of beginning." Afterwards, on the 29th day of December, 1881, the appellant paid the taxes assessed against said real estate for the years 1880 and 1881, amounting to \$37.78, and took the treasurer's receipt for the same. Then follows a part of the complaint, which we quote :

"And the plaintiff further says that, on the 4th day of February, 1882, the said O. H. Temple, in the name of Orange H. Temple, as plaintiff, commenced an action in the circuit court of Tippecanoe county, Indiana, against the plaintiff herein and William Schilling, as treasurer of said city of Lafayette, said Schilling being the treasurer of said city, to quiet his title to the aforesaid real estate, as against said Schilling, the treasurer, as aforesaid, and the plaintiff herein, and all persons claiming by, through or under them, and that the said Schilling, treasurer aforesaid, be forever enjoined and restrained from executing a deed upon said certificate issued to the plaintiff herein upon said private sale aforesaid by the said Blackmer, and that the plaintiff herein be decreed and directed to deliver up said certificate for cancellation, and that the same be cancelled. And it was further averred, among other things, in the complaint filed in said action, that none of the aforesaid real estate had been listed or assessed for taxation for any purpose or in any manner by said city, any of the officers, or by any person or persons for it, for any of the years hereinbefore set forth ; and, further, that the description as first set forth, and as appeared on the duplicate and delinquent duplicate, was indefinite, uncertain, and described no property whatever, and that no sale could be based thereon, and no rights thereunder of any kind could be acquired by a purchaser at said tax sale aforesaid ; that, upon said complaint in said action, such proceedings were had in said court and against the defendants therein, that it was finally determined and adjudged by the court that the title of said Temple to the real estate lastly described herein be forever quieted as against the plaintiff herein and the said William Schilling, and that the purchase made by the plain-

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tiff herein at private sale of said real estate, on said 18th day of February, 1880, under the description herein first set forth, be set aside and held for naught, and that the plaintiff herein be forever enjoined and restrained from taking or receiving a deed upon his said certificate of purchase, and that by his said purchase he take no rights whatever, or secure any interest in, or lien upon, said real estate whatever; and that said William Schilling, or his successor in office, be forever enjoined from issuing a deed to the plaintiff herein, or to any person claiming under him, upon the certificate aforesaid. The plaintiff further says that the defendant herein, by its attorney, appeared to said action by and on behalf of the said treasurer, William Schilling, which was so commenced on the 4th day of February, 1882, and in which said proceedings aforesaid were had, and filed pleadings for and in behalf of said treasurer, and upon which the aforesaid adjudication was had, and that such appearance on the part of such attorney was not in the interest of said treasurer, but in the interest of the defendant herein."

To the complaint the court below sustained a demurrer, the appellant reserved the proper exception, and the appellant refusing to amend his complaint, judgment was rendered for the appellee.

At the time of the sale the statute of 1872 was in force, but before the institution of the suit brought by Temple against the appellant and the treasurer of the appellee, recited above, the statute of 1881 came into force.

We are of the opinion that the statute of 1881 controls, and must be looked to in determining the rights of the parties. *Peckham v. Millikan*, 99 Ind. 352; *McWhinney v. City of Indianapolis*, 101 Ind. 150; *Helms v. Wagner*, 102 Ind. 385; *Culbertson v. Munson*, 104 Ind. 451.

The only substantial difference between section 6487, R. S. 1881, and section 228, 1 R. S. 1876, p. 124, which is the corresponding section, is, that we find the following words in the former that are not in the latter: "Or if the description

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is so imperfect as to fail to describe the land or lot with reasonable certainty."

But when we come to construe section 6487 with section 6488, and section 228 with section 229, we must come to the conclusion that there is no substantial difference between the statutes, except in sales where the land or lot is so uncertainly and vaguely described that the statute can not find it so as to cast a lien upon it.

In a case of that kind, under the act of 1881, the right to be reimbursed from the county or city treasury (as the case may be) is given, but did not exist under the act of 1872, as found in 1 R. S. 1876. *State, ex rel., v. Casteel*, 110 Ind. 174; *Sharpe v. Dillman*, 77 Ind. 280.

It is not every imperfect description that gives this right, however, but only one such as we have indicated. The description may be uncertain and indefinite, and so much so as to render the sale ineffectual to convey title, but be sufficiently definite and certain to carry a lien. *Sloan v. Sewell*, 81 Ind. 180; *State, ex rel., v. Casteel, supra*; *Cooper v. Jackson*, 99 Ind. 566; *Worley v. Town of Cicero*, 110 Ind. 208. Such, we think, was the description in the case under consideration, and we would be compelled to hold the complaint bad, independent of the averments as to the former adjudication between Temple, who held the title, and the appellant and the city treasurer. In the complaint in that case it was averred that the description was so uncertain that the appellant acquired no lien upon the real estate, or interest of any kind therein; the city treasurer was enjoined from making a deed to the purchaser, and it was decreed that the appellant by his purchase acquired no lien or interest of any kind upon or in the real estate, and his certificate was cancelled. The city was not a party to the action, but its city treasurer, upon whom the laws cast the duty of making the sale, issuing the certificate and making the deed, was a party. R. S. 1881, sections 3091, 3092, 3093, 3094.

It is further averred that the city defended the action in

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the name of its treasurer, by its own attorney, for its own benefit. We are of the opinion that the judgment and decree were binding on the city to the same extent as though it had been named as a party to the action. *Montgomery v. Vickery*, 110 Ind. 211; *Freeman Judgments*, section 174; *Stoddard v. Thompson*, 31 Iowa, 80; *Cole v. Favorite*, 69 Ill. 457; *Wood v. Eusel*, 4 Cent. Law Journal, 120; *In re Ayers*, 123 U. S. 443; *Palmer v. Hayes*, 112 Ind. 289; *Burns v. Gavin*, ante, p. 320.

We are further of the opinion that the decree and judgment bring the case within section 6487, R. S. 1881, and that the facts averred give to the appellant the right to be reimbursed from the city treasury, and that therefore the complaint was good, and the demurrer should have been overruled.

Judgment reversed, with costs.

Filed April 18, 1889.

No. 13,839.

PARKER v. THE STATE.

CRIMINAL LAW.--*Assault and Battery.—Affidavit.—Sufficiency of.*—An affidavit charging that the defendant “did, in a rude, insolent, angry and unlawful manner, touch, beat and strike” the affiant, shows that the touching and striking were unlawful, and the pleading is not bad, although the word “unlawful” is not in the place usually assigned it.

From the LaGrange Circuit Court.

O. L. Ballou, J. D. Ferrall and C. H. Hulburt, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Kirkpatrick v. Taylor, Treasurer.

ELLIOTT, C. J.—The charging part of the affidavit on which the appellant was tried and convicted reads thus: “That the defendant, John W. Parker, at said county of La-Grange, in the State of Indiana, did, in a rude, insolent, angry and unlawful manner, touch, beat and strike him, the said George W. Wright.” We perceive no substantial defect in this affidavit. The word “unlawful” is not in its usual and appropriate position, but, as it is in the affidavit, the fact that it is not in the position usually assigned it does not vitiate the pleading.

Appellant’s counsel are in error in assuming that the affidavit fails to show that the touching and striking were unlawful.

Judgment affirmed.

Filed April 19, 1889.

118	329
121	107
118	329
128	306
118	329
132	4
132	19
132	881
118	329
154	619

No. 13,716.

KIRKPATRICK v. TAYLOR, TREASURER.

DRAINAGE.—Repairs.—Discretion of County Surveyor.—Act of 1885.—The propriety of repairing a public ditch is committed by section 10 of the act of April 6th, 1885 (Acts of 1885, p. 141), to the discretion of the county surveyor, and his decision is final.

SAME.—Appeal from Assessment.—Questions Determined upon.—Upon an appeal by a land-owner from an assessment made under the provisions of section 10 of the act of 1885, it is proper to determine whether the appellant’s land is subject to assessment for repairs.

From the Delaware Circuit Court.

G. H. Koons, for appellant.

W. W. Orr, for appellee.

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OLDS, J.—This is an action to enjoin the collection of an assessment made by the county surveyor to reimburse the treasury for money paid out in repairing a ditch in accordance with the drainage act of 1885.

The complaint alleged the construction of a main open ditch and five other tributary tile ditches, upon a petition therefor filed and proceedings had before the board of commissioners of Delaware county, under an act of the Legislature approved April 21st, 1881; that the several ditches were constructed under one application and petition, but assessments were made separately for the construction of each ditch, some of the lands affected being assessed for the main open ditch and for some of the tributary tile ditches, but separate assessments for each ditch; that the lands of the plaintiff were not assessed for the original construction of the open ditch, but were only assessed for the construction of its tributary tile ditch No. 4; that the surveyor repaired the main open ditch to its full dimensions, under the provisions of section 10 of an act approved April 6th, 1885 (Acts of 1885, p. 141), the cost of which repairs was certified under said act and paid out of the county treasury, as in said act provided, and the county surveyor made an assessment to reimburse the county treasury, and in making such assessment assessed the lands of the plaintiff, which had not been assessed for the construction of said main open ditch. It is further averred that said ditch had never been constructed and completed according to the original specifications, in that two stations of one hundred feet each had not, nor had any part of the same, been excavated, and that ten other stations, of one hundred feet each, had not been completed, and only about one-half of said ten stations had been excavated in accordance with the original specifications. Prayer for an injunction enjoining the collection of said assessment so made by said surveyor.

Demurrer to the complaint, and the demurrer sustained by

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the court below, and exceptions reserved, and the ruling on the demurrer is assigned as error.

It is urged by counsel for appellant, that, the ditch not having been completed according to the original specifications, the county surveyor had no authority to make the repairs, and, having no authority to make them, the assessment made by him was without authority, illegal and void; also, that the surveyor had no authority to assess any lands for the repairs that were not originally assessed for the construction of the main open ditch, and that, the plaintiff's land not having been assessed for the construction of the main ditch, it was not liable to be assessed for the repairs, and that such assessment was without authority, illegal and void; that the plaintiff had no remedy by appeal under section 10 of said act.

The case of *Markley v. Rudy*, 115 Ind. 533, is decisive of the first question. It is held in that case that the propriety of making the repairs is committed to the discretion of the county surveyor, and that his decision is final. The court, in construing the statute in that case, says: "The evident intention of section 10, *supra*, is to commit the question of the propriety of repairing a public ditch to the discretion and decision of the proper county surveyor, and to treat his decision in favor of the propriety of repairing it as final." The statute having been so construed, we deem it proper to adhere to such construction. See, also, *Weaver v. Templin*, 113 Ind. 298.

As to the adequacy of plaintiff's remedy on appeal, the statute provides: "The only question tried shall be to determine the costs of such repair and what amount thereof should be assessed against the appellant's lands." Upon such appeal it is certainly proper, and within the scope and meaning of the statute, to determine whether the appellant's lands were subject to any assessment for such repairs, and whether there should be any part of the costs assessed against such lands. It could not be determined what amount should be

assessed against the lands without determining whether any part should be so assessed.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed April 19, 1889.

118	332
129	296
129	574

118	332
132	348

118	332
151	18

118	332
158	599

No. 14,703.

GREEN v. STOBO ET AL.

SHERIFF'S SALE.--*Redemption by Heir.*--*Right of Creditor to Re-Sale.*--Where real estate sold on execution or decretal order is redeemed by an heir of the deceased judgment debtor, the sale is thereby vacated, under section 770, R. S. 1881, and the real estate again subject to sale to satisfy any unpaid balance of the judgment.

SAME.--*Decedent's Estate.*--*Filing Claim Against.*--*Release of Lien.*--*Waiver.*--A judgment creditor, by filing a claim against the estate of the deceased debtor for the unpaid balance of his judgment and procuring it to be allowed, does not release his lien or waive his right to enforce the original judgment by a re-sale of land after the previous sale has been vacated by redemption.

JUDGMENT.--*By Default.*--*Relief from.*--*Absence of Attorneys.*--For facts held sufficient, under section 396, R. S. 1881, to entitle a party to relief from a judgment taken against him by default, during the absence of his attorneys, see opinion.

From the Jackson Circuit Court.

B. H. Burrell, for appellant.

F. T. Hord and *M. D. Emig*, for appellees.

BERKSHIRE, J.--This action was brought by the appellant against the appellees to enjoin the sale on execution

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of certain real estate described in the complaint. The record discloses the following state of facts :

On the 30th day of August, 1884, Prince H. Green was the owner of the said real estate, and on that day executed a note to the decedent, Merritt, for one thousand dollars, and a mortgage upon the real estate to secure the note, which was duly recorded. The said Prince H. Green died on the 5th day of December, 1884, intestate, leaving his widow, Rhoda R. Green, and his children, Cyrus L., Junius W., Minnie, Emma and Marcellus B. Green, as his only heirs. Cyrus L. Green became the administrator of his father's estate. On the 8th day of November, 1886, the appellee Stobo, as administrator of the estate of Merritt, brought suit in the Jackson Circuit Court against said Cyrus L. Green, as administrator, and said widow and heirs, to foreclose said mortgage, and obtained a judgment on the said note for \$1,256.68, and for costs taxed at \$17.50, and a decree of foreclosure. On the 1st day of December, 1886, an order of sale issued upon the said judgment and decree to the appellee Byrne, who was then the sheriff of said county. On the 31st day of December of the same year the said sheriff sold said real estate to the said Stobo, as administrator, for the sum of \$500. On the 30th day of December, 1887, the appellant, he being one of said heirs of the said Prince H. Green, deceased, redeemed the said real estate from said sale and paid in redemption the sum of \$540, and on the 11th day of January, 1888, appellant obtained from the widow and other heirs of his said father conveyances for their interests in the said real estate. On the 31st day of December, 1887, Stobo, as administrator, filed his claim against the estate of the said Prince H. Green for the unpaid balance of said judgment, which was allowed. On the 22d day of February, 1888, the appellee Stobo caused an execution to issue on said judgment of foreclosure to the appellee Byrne, he being still the sheriff of said county, commanding him to sell the said real estate to satisfy the

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balance still due on said judgment. On the 5th day of April, 1888, the said sheriff levied said execution on the said real estate and advertised the same for sale May 5th, 1888. It is claimed that by reason of the sale of said real estate upon the order of sale first issued, the judgment became satisfied and ceased any longer to be a lien on the real estate, and that the claim that is now made casts a cloud upon the title of the appellant. There is then a prayer for a temporary and permanent injunction.

The appellees demurred to the complaint, and the court sustained the demurrer; the appellant excepted to the ruling of the court, and judgment was rendered for the appellee.

The errors assigned are, that the court erred (1) in setting aside the appellant's judgment by default, and (2) that the court erred in sustaining the demurrer to the complaint.

Section 770, R. S. 1881, known as the "Redemption Law," reads as follows: "Whenever any real estate, interest therein, or parcel thereof, sold as aforesaid, shall be redeemed by the owner or any part owner, or persons claiming under them, as above provided, the sale thereof by the sheriff shall be wholly vacated as to the real estate, interest therein, or part thereof redeemed, and the real estate subject to sale on execution, as if such sale had not been made, saving to a part owner redeeming his lien as aforesaid. But whenever real estate, or an interest therein has been sold by the sheriff as aforesaid, no re-sale thereof shall be had upon execution or decretal order issued upon any judgment or decree, junior in lien to that upon which the sale was made, within one year from the date of such sale, unless the same shall have been previously redeemed by the owner or part owner, or some one claiming under either, as above provided."

The language employed in this section seems to be plain, and not difficult to understand. Whenever the owner of real estate which has been sold by the sheriff on execution or decretal order, or the owner of any interest therein, shall redeem the same from the sale, the sale thus made shall be

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wholly vacated as to the said real estate, and the same subjected to sale on execution as if no sale had been made. The redemption operates to restore the lien to the full extent and in all its force, as it existed before the sale, and the real estate is involved to the same degree for the payment of the remainder of the judgment as it was originally for the whole of it.

We quote from the opinion in the very recent case of *Hervey v. Krost*, 116 Ind. 268, the following, with reference to the construction to be placed upon the section of the statute under consideration: "When property is redeemed by any person or persons falling within the description of those designated in section 770, the effect of the redemption is to annul or vacate the sale, and the judgment upon which the sale was made, so far as it remains unsatisfied by the bid, again becomes a lien upon the land, and is reinstated to its former position. *Goddart v. Renner*, 57 Ind. 532; *State, ex rel., v. Sherill*, 34 Ind. 57; *Bodine v. Moore*, 18 N. Y. 347. Accordingly, it has been held that a redemption by one who took a conveyance from the judgment debtor of real estate previously sold at sheriff's sale, or by one who purchased the property at a sheriff's sale made subsequent to the sale redeemed from, simply annulled the first sale, and restored the property to the position it occupied before the sale, with the judgment lien or liens reinstated, for any sums remaining unpaid. *Cauthorn v. Indianapolis, etc., R. R. Co.*, 58 Ind. 14." See *Groves v. Barber*, 98 Ind. 309; *Duke v. Beeson*, 79 Ind. 24. The appellant is clearly within said section 770. He only had the right of redemption because of the interest he had in the real estate by inheritance from his father, the mortgagor.

We can not conceive upon what principle it can be claimed that the appellee Stobo waived or released his lien by filing, and procuring the allowance of, a claim for the balance unpaid on the judgment after the sheriff's sale against the estate

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of Prince H. Green. It is not averred or claimed that any part of the claim was paid by the administrator of said estate.

We are of the opinion that the showing was sufficient, and that the court committed no error in setting aside the default and judgment taken against the appellees on the second day of the August term of the Jackson Circuit Court. The judgment was rendered on the 21st day of August, and the application was made to set it aside on the 27th day of the same month and during the same term. The application showed that Stobo, the appellee more particularly interested, as soon as he was served with process, being a resident of Bartholomew county, employed a firm of lawyers residing in that county to take charge of the case for him; that some three weeks before the commencement of the term at which the judgment was taken, one of the firm was called away on business, and was still absent when the term began; that on Saturday, the 18th day of August, the other member was, by telegram, called to the State of Iowa to attend the funeral of his father-in-law, and before going did not have an opportunity to confer with his client, and did not return until after the judgment had been taken; and, in addition, that the said appellee had formed an impression from conversations with his said attorneys that the Jackson Circuit Court did not convene until August 27th.

The application stated a complete defence, which was that the complaint stated no cause of action. The facts as disclosed in the motion and application make a very clear case within section 396, R. S. 1881, and we think that it would have been a denial of justice to have overruled it, and refused to set aside the judgment.

Judgment affirmed, with costs.

Filed April 19, 1889.

The City of Madison v. Abbott.

No. 13,738.

118	837
155	133

THE CITY OF MADISON v. ABBOTT.

FERRIES.—License.—Interstate Waters.—A State may, either directly or through a grant of power delegated to a municipal corporation, exact reasonable license fees from the keepers of ferries living within the State, although their boats ply between landings lying in two different States.

SAME.—Municipal Regulation.—The common council of a city may prescribe reasonable regulations for the government of interstate ferries, and may designate the time and place of landing, consistently with the general law and with such regulations as the board of county commissioners is authorized to make.

SAME.—Time of Running.—Exclusive Control of County Commissioners.—City Ordinance.—The board of commissioners of the proper county is exclusively authorized by statute to regulate the hours during which a licensed ferryman, whose boat runs to and from points without the limits of the State, is required to keep his ferry open and run his boats, and a city ordinance prescribing inconsistent regulations is not enforceable.

From the Jefferson Circuit Court.

M. D. Wilson and *C. E. Walker*, for appellant.

E. G. Leland and *S. E. Leland*, for appellee.

MITCHELL, J.—An ordinance adopted by the common council of the city of Madison in August, 1873, made it unlawful for any person to establish, set up or keep a ferry, or to use any boat or craft of any description for the purpose of carrying persons or property across the Ohio river, without having first obtained a license for that purpose from the common council. The ordinance required a license fee of twenty-five dollars to be paid into the city treasury, and prescribed the amount which might be demanded and received by ferrymen for transporting persons and property across the river. Among many other regulations the ordinance required the keeper of the ferry to land his boat at

The City of Madison v. Abbott.

the landing place once in every forty minutes, and that he should not remain at the landing more than fifteen minutes, upon pain of a forfeiture or fine of not exceeding twenty-five dollars for each offence.

The complaint upon which this action rests charges that the defendant, Abbott, having been duly licensed by the common council to maintain and operate a steam ferry from the city of Madison, in the State of Indiana, across the Ohio river to the opposite side, violated section 3 of the above mentioned ordinance, on a day named, by keeping his ferry-boat longer than fifteen minutes at such landing place.

The circuit court dismissed the complaint, and the city prosecutes an appeal to this court and asks that the judgment be reversed.

An act which went into force March 14th, 1867, conferred general power upon the common council of any city to establish and regulate ferries across any stream or river passing through or bordering upon the corporate limits of the city, to exact reasonable license fees from the keepers of ferries, to designate the kind of boats to be used, and the times and places of landing, and to prescribe the rate of ferriage to be charged. Section 3103, R. S. 1881. It was subsequently enacted that no person should be permitted to maintain a public ferry across any stream bordering the State, running to and from points without the limits of the State, without first having obtained a license from the board of commissioners of the proper county for that purpose. By this later act the ferry-keeper is required to enter into a recognizance to the State of Indiana, conditioned, among other things, to supply the ferry with boats and appliances, and a sufficient number of hands to manage the boats during the several hours in each day, and at such rates of ferriage, as the board granting the license shall from time to time order and determine. The act confers power on the board to require more than one boat to be kept, and that the ferry shall be kept open until midnight, and to fix the rate of

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ferriage, and it declares all laws and parts of laws in conflict therewith repealed.

It is settled that a State may either directly, or through a grant of power delegated to a municipal corporation, exact reasonable license fees from the keepers of ferries living within the State, although their boats ply between landings lying in two different States, this being but the ordinary exercise of the police powers vested in the State, or delegated by it to the municipal corporation. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Fanning v. Gregoire*, 16 How. 524; *Conway v. Taylor*, 1 Black, 603; 7 Am. & Eng. Ency. of Law, p. 952.

The States have authorized and regulated ferries from the earliest history of the government, not only over waters entirely within their limits, but over rivers separating one State from another, it being conceded that interstate ferries could be managed and regulated more advantageously by the State, through its instrumentalities, than by the general government. The privilege of keeping a ferry, with the right to take toll for passengers and freight, is, therefore, a franchise granted by the State, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

In the exercise of this power the State may employ such instrumentalities as it may select, subject only to the constitutional inhibition against the imposition of taxes or burdens upon interstate commerce, and of the further duty of not permitting conflicting or inconsistent regulations which would tend to impede interstate communication.

The case before us involves no question concerning the power of the city to exact a license fee from ferry-keepers residing within the State, and we are, therefore, not called upon to consider that feature of the ordinance. *Duckwall v. City of New Albany*, 25 Ind. 283; *Shallcross v. City of Jefferson-*

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ville, 26 Ind. 193; *Lutz v. City of Crawfordsville*, 109 Ind. 466; *City of Frankfort v. Aughe*, 114 Ind. 77.

The present case brings in question only that section of the ordinance which requires of the ferry-keeper that a ferry-boat shall land at the landing place once every forty minutes, and that it should not remain at the landing place longer than fifteen minutes at a time. The section in question seems to imply that every forty minutes, by night as well as by day, on Sunday and on secular days, a boat must be landed at the landing place, and that at no time can it remain there to exceed fifteen minutes.

The board of commissioners of the proper county is expressly authorized to regulate the hours during which a licensed ferryman, whose boats run to and from points without the limits of the State, is required to keep his ferry open and run his boats.

This is one of the subjects covered by the condition in the bond which the board is required to take before granting the license. It can not be supposed that it was intended that both the common council of the city and the board of commissioners should adopt regulations which might be conflicting and inconsistent upon the same subject. Without doubt the common council of a city may prescribe reasonable regulations for the government of interstate ferries, and may designate the time and place of landing, conformably to the general law and such regulations as the county commissioners are required to make. It may provide wharfage and landing places, and other facilities for ferry-boats and passengers, and make all such rules and regulations respecting the use of the same as may tend to prevent confusion and collision, and to secure the health, safety and comfort of the public. It may also prescribe penalties for any violation of its reasonable regulations, and it may impose a tax in some form, either as a license or otherwise, upon the instrumentalities within its jurisdiction, which are employed by the ferryman, sufficient to meet the expense of enforcing the execution of

 Wisehart v. Hedrick et al.

its regulations. *Gloucester Ferry Co. v. Pennsylvania, supra*; *Transportation Co. v. Parkersburg*, 107 U. S. 691.

In respect to such regulations, however, as are expressly committed to the boards of commissioners, in order that consistency may be maintained, it must be deemed that the power of the board is exclusive. As we have seen, the hours in each day during which ferry-boats shall be run on interstate waters, and the rates of ferriage, are subject to the control of the boards of commissioners, and are specially covered by the ferryman's bond. If these subjects were also within the control of another independent body, confusion and conflict would be inevitable.

The offence complained of in the present case was committed on Sunday. We may reasonably infer that the regulations or requirements of the board of commissioners did not compel the defendant to land his boat every forty minutes, and not remain longer than fifteen minutes at the landing, on Sunday, unless some necessity for so doing was shown.

The judgment is affirmed, with costs.

Filed April 19, 1889.

 No. 12,830.

WISEHART v. HEDRICK ET AL.

MORTGAGE.—Representation of Title.—Estoppel.—One who represents to a third person, upon inquiry, that he has sold certain land to another, who is in possession thereof, and that the latter has sufficient title to support a mortgage to secure money which he proposes to borrow from the inquirer, is estopped, in a suit to foreclose a mortgage taken in reliance upon his representations, to deny that the mortgagor had title.

118	341
124	508
126	221
118	341
136	101
118	341
140	258
118	341
144	74
118	341
154	270
118	341
157	589

Wisehart v. Hedrick *et al.*

SAME.—*Fraud.—Preconceived Design.*—An estoppel may arise where there is no preconceived design to deceive or mislead; the fraud consists in denying a representation upon which another has acted, and the repudiation of which will entail loss upon him.

From the Henry Circuit Court.

J. Brown and W. A. Brown, for appellant.

G. L. Swann, J. M. Brown and R. Warner, for appellees.

ELLIOTT, C. J.—The appellant's complaint is founded upon a note and mortgage executed to the appellant by the appellee Watkins. Hedrick was made a party defendant because he claimed an interest in the mortgaged premises, and he answered the complaint. The first paragraph of his answer is the general denial.

The second paragraph alleges that he was the owner of the land prior to the execution of the mortgage, and that he did not execute it nor receive any part of the consideration for which it was executed. The third paragraph alleges that he entered into a contract with the mortgagor, Watkins, wherein it was agreed that he should, upon the payment of a designated consideration in property and money by Watkins, convey to him the land described in the mortgage; that no part of the consideration was paid, and, on the 27th day of December, 1883, Watkins surrendered all claim and right to the land. The reply of the appellant contains these material allegations: That the note set forth in the complaint was executed for money loaned to Watkins; that, prior to making the loan, Watkins informed the plaintiff that he had purchased the land; that he was in possession of it, and was erecting a house thereon; that, before the plaintiff made the loan, he notified Hedrick that Watkins desired to borrow the money, and proposed to secure its payment by a mortgage on the land; that Hedrick then informed the plaintiff that he had sold the land to Watkins, and that Watkins had "a sufficient title to the property and a sufficient interest therein to make the mortgage good, and that he could, so far as he,

Wisheart v. Hedrick *et al.*

Hedrick, was concerned, take the mortgage, and it would be good ;” that Hedrick also represented to the plaintiff that “ Watkins had a sufficient interest in the property, and had so far paid for it that it would be good security for the loan about to be made, and any residue of the purchase-money that Watkins might owe him ; that the plaintiff relied upon the statements and promises so made by Hedrick, and was ignorant of the nature of the contract between Hedrick and Watkins as to the amount of the purchase-money paid, or to be paid, by Watkins for the land.

It is important to observe that the answer does not proceed upon the theory that Hedrick has a vendor’s lien, but upon the theory that he has the whole title and has it free from the lien of the appellant’s mortgage. If Hedrick’s answer asserted a right to enforce his vendor’s lien we should have an entirely different case, but this is not what it asserts, for it asserts an absolute title, thus seeking to cut off the appellant’s right as a junior encumbrancer. The purpose of the answer is not to establish a paramount lien, but to establish a title which shall divest the mortgagee of any lien at all. The question, therefore, is: Does the reply state such facts as avoid the claim of Hedrick to the ownership of the whole title, free from any lien of the appellant’s mortgage? We think it does. We regard it as clear, from the facts pleaded, that the mortgagor had an interest in the land which was subject to mortgage, and that Hedrick is estopped to deny that the mortgagor did have such an interest. We do not hold that Hedrick may not have an enforceable vendor’s lien which is paramount to appellant’s mortgage, but we do hold that he can not be heard to say that the mortgagor had no interest in the land which he could convey by mortgage.

If Watkins did have an interest in the land which he had a right to mortgage, then no agreement between him and Hedrick could deprive the mortgagee of his lien. As Hed-

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rick represented that the mortgagor did have such an interest, and that representation induced the appellant to make the loan, the representation can not be withdrawn or gain-said to the injury of Wisehart.

The representation that Watkins did have title is the important one, for if he did have title, the mortgage fastened upon it, subject to prior equities, and the lien thus created could not be displaced by any subsequent agreement between the mortgagor and his vendor, for, whatever the interest of the mortgagor was, the lien attached to it, and the mortgagee has the right to a decree of foreclosure and to the proceeds of the sale on the decree remaining after the satisfaction of prior liens. It was not in the power of the vendor and the mortgagor to revest title in the former and shut out the intervening mortgage. Nor would it alter the case if it were true that the mortgagor did not, in fact, acquire title, since, as we have seen, the vendor can not repudiate his statements to the mortgagee. This he can not do, even though he may have had no preconceived design to deceive or mislead the appellant. An estoppel may arise where there is no previously formed design to defraud, for the fraud which the law condemns consists in denying a representation upon which another has acted and the repudiation of which will entail a loss upon him. *Anderson v. Hubble*, 93 Ind. 570 (47 Am. Rep. 394); *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 301; *Quick v. Milligan*, 108 Ind. 419, 421; *Kelley v. Fisk*, 110 Ind. 552, and cases cited, p. 554. As the appellee Hedrick can not be allowed to deny that the mortgagor had title, he is not in a situation to defeat the foreclosure of the mortgage, although he may, perhaps, have a right to a decree establishing his vendor's lien and its priority. The appellant has, at all events, a right to have the property sold and to the avails of the sale remaining after the satisfaction of prior liens, and what that will be can not be determined for

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him by the mortgagor and his vendor, but must be ascertained by a decree and sale made under authority of law.

Judgment reversed.

Filed April 20, 1889.

No. 13,744.

BATEMAN v. MILLER.

JUDGMENT.—*Jurisdiction.*—*Collateral Attack.*—Where a court of general jurisdiction has jurisdiction of the subject-matter of an action and of the parties thereto, its judgment is not void and can not be collaterally attacked, but is binding until reversed or set aside in some appropriate proceeding for that purpose.

SAME.—*Presumption as to Jurisdiction.*—Where a judgment is rendered by a court having jurisdiction of the subject-matter of the action, it will be presumed, where its record is silent, that it acquired jurisdiction of the parties.

REAL ESTATE.—*Mortgage.*—*Foreclosure.*—*Sale.*—*Title of Purchaser Relates Back.*—The title acquired by a purchaser at a sale under a decree foreclosing a mortgage relates back to the date of the mortgage.

SAME.—*Ejectment.*—*Possession by Stranger.*—*Disclosure of Title.*—Where such a purchaser, in an action by him to recover possession against one who was not a party to the foreclosure suit, makes out, *prima facie*, a perfect title, the defendant, if he has any title, must disclose it.

From the Montgomery Circuit Court.

W. H. Thompson and J. West, for appellant.

M. E. Clodfelter and J. A. Lindley, for appellee.

COFFEY, J.—This was an action brought in the Boone Circuit Court by the appellant against the appellee to recover the possession of the real estate described in the complaint. On a change of venue the cause was tried in the Montgomery Circuit Court. The facts are found specially, and conclusions of law thereon stated.

The material facts, as found by the court, are substantially as follows :

118	345
148	78
150	267
150	268
118	345
154	379

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On the 19th day of August, 1879, the appellant, Sarah Bateman, and John M. Bateman commenced an action in the Boone Circuit Court against John W. Barber, Spice A. H. Barber, Susan Barber, George W. Gibson and John McLane to foreclose a mortgage executed by the said John W. Barber and Spice A. H. Barber, his wife, on the 1st day of September, 1871, on the land in controversy here, with other lands, being lots 16, 17 and 18, in Piersol's second addition to the town of Jamestown, in Boone county, Indiana, to secure the payment of six promissory notes of \$1,000 each. All of the defendants to said action were duly served with process. On the 3d day of September, 1879, the said John W. Barber and Spice A. H. Barber, by Wesner & Nave, their attorneys, filed a demurrer to the complaint in said cause. On the 7th day of October, 1881, the court made the following entry in said cause, viz.:

"Come now the parties, by their attorneys, and file the following written agreement in this cause, to wit:

"The plaintiffs to have personal judgment against John W. Barber for five thousand four hundred and ninety dollars, and a foreclosure of said mortgage against all of said defendants as to lot (16) sixteen, and that the defendant George W. Gibson has a prior lien upon said lots 17 and 18 for two thousand dollars, and no foreclosure is to be taken against said lots 17 and 18, and the said defendant George W. Gibson now pays the plaintiffs the sum of two hundred and fifty dollars, the receipt whereof is hereby acknowledged, and the decree is to be rendered according to this agreement.

"SARAH A. BATEMAN.

"JOHN M. BATEMAN.

"By G. H. GOODWIN, *Attorney*.

"GEORGE W. GIBSON.

"JOHN McLANE.

"JOHN T. McLANE.

"By C. S. WESNER, JOHN W. CLEMENTS and W. J. DARNELL, *Att'ys for Def'ts.*"

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Upon this agreement the court rendered judgment in said cause for the sum of five thousand four hundred and ninety dollars against the said John W. Barber, and a decree of foreclosure as to lot sixteen (16) against all the other defendants. On the 22d day of May, 1884, the clerk of said court issued to the sheriff of said county a duly certified copy of said decree, who, after due notice, sold said lot 16 to the plaintiffs in said judgment and decree for the sum of five dollars, and issued to them a certificate of purchase. John M. Bateman, who was the husband of the appellant, died in the year 1885, before the year for redemption had expired, leaving the appellant as his widow. The year for redemption having expired, and said lot not having been redeemed, the sheriff of said county, on the 26th day of August, 1885, executed to the appellant a sheriff's deed for said property in due form of law. Before the commencement of this suit the appellant, by her agent, demanded possession of said lot of the appellee, which he refused to surrender, and still holds the same. The said John M. Bateman was the owner and in the possession of said property on the 1st day of September, 1871, and on said day sold and conveyed the same by warranty deed to the said John W. Barber, who, to secure part of the purchase-price, executed the mortgage herein described and foreclosed as aforesaid. The appellee does not claim to hold by any contract with either the said John M. Bateman or the appellant.

Upon the facts found the court stated as conclusions of law:

1st. That the judgment of the Boone Circuit Court, as against John W. Barber, is void.

2d. That the plaintiff's alleged title and right of possession of the premises described in the complaint rests upon said judgment and the subsequent proceedings thereunder; that, the said judgment and subsequent proceedings thereunder being void as against the party having the legal title to said real estate at the time of the rendition of the judgment, the

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plaintiff is not entitled to recover against the defendant, who is in possession of said real estate.

The error assigned in this court is that the Montgomery Circuit Court erred in its conclusions of law upon the facts as found.

In Freeman on Judgments (3d ed.), section 116, it is said by the author: "It has often been said that a judgment is void whenever the court which pronounced it had not jurisdiction of the parties to the judgment, or of the subject-matter in controversy. * * * The weight of the adjudged cases, as will hereafter be shown, sustains the proposition that the judgment of a domestic court of general jurisdiction is not void, except when the court has no jurisdiction over the subject-matter of the suit, or when, having such jurisdiction over the subject-matter, it is shown by the record to have had no jurisdiction over the judgment defendant."

"Jurisdiction being obtained over the person and over the subject-matter, no error in its exercise can make the judgment void." Freeman Judg. (3d ed.), section 135.

"Where the record of a court of general jurisdiction is silent, jurisdiction is presumed, and we must, therefore, presume that the court did possess the requisite jurisdiction." *McCormick v. Webster*, 89 Ind. 105; *Bloomfield R. R. Co. v. Burress*, 82 Ind. 83; *Dwiggins v. Cook*, 71 Ind. 579; *Sims v. Gay*, 109 Ind. 501.

Where a court of general jurisdiction has cognizance of the matter in controversy and of the parties, its decree is binding on all other courts until it is reversed or set aside by some appropriate proceeding for that purpose. It can not be attacked collaterally. It is conclusive as to all matters therein embraced, including the findings as to parties before the court. *Anderson v. Wilson*, 100 Ind. 402; *Sauer v. Twining*, 81 Ind. 366; *Horner v. Doe*, 1 Ind. 130. Everything is presumed in favor of the action of the court. For anything that appears in the record of that cause, John W.

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Barber was present in court consenting to the rendition of judgment against him. *Callen v. Ellison*, 13 Ohio St. 446; *Gall v. Fryberger*, 75 Ind. 98; *Evans v. Ashby*, 22 Ind. 15. As the Boone Circuit Court had jurisdiction of both the subject-matter and the parties, our opinion is that its judgment is not void. At the most, it is only voidable, and can not be attacked collaterally.

It is contended, however, by the appellee that as the appellant must recover on the strength of her own title the special finding does not warrant a judgment against him, because he is a stranger to the record in the foreclosure suit against John W. Barber and others.

It is shown by the special finding that at the time John W. Barber and his wife executed the mortgage involved in that suit he was the owner and in the possession of the property in controversy, having derived it by purchase and conveyance from John M. Bateman. The appellant's title relates back to the date of that mortgage, and she is presumed now to be vested with all the title John W. Barber had at that time. In the absence of some showing to that effect, we do not think we are authorized to presume that the appellee was the owner by purchase from John W. Barber at a time prior to the commencement of the foreclosure suit. Indeed, there is nothing in the special finding from which it can be inferred that the appellee ever had any title. If he had, in our opinion, when the appellant had made out, *prima facie*, as she did, a perfect title, he should have disclosed it. In our opinion the Montgomery Circuit Court erred in its conclusions of law upon the facts as found, for which error the judgment must be reversed.

The judgment of the court below is reversed, at the costs of the appellee, with instructions to the Montgomery Circuit Court to restate its conclusions of law, and for further proceedings not inconsistent with this opinion.

Filed April 23, 1889.

The State, *ex rel.* Hovey, v. Noble *et al.*

No. 14,804.

THE STATE, EX REL. HOVEY, v. NOBLE ET AL.

COURTS.—*Judiciary an Independent Department.*—The judiciary is a separate and an independent department of government. Const., art. 3.

SAME.—*Constitutional Powers.*—The courts are exclusively invested by the Constitution with the whole judicial power of the State, as such power existed when the Constitution was framed. Const., art. 7, sec. 1.

SAME.—*Assistants.—Selection of.*—Neither the Governor nor the Legislature can select persons to assist the courts in the performance of their judicial duties.

SAME.—*Courts Choose Assistants.*—Where assistants are necessary to enable judges to discharge their judicial functions, the power to choose such assistants resides in the court.

SAME.—*Power of Appointment.*—While the power of appointment is intrinsically executive, it may be exercised by a court or by a legislative body as a necessary incidental power.

SAME.—*Supreme Court Commissioners.—Legislature can not Appoint.*—The Legislature can not appoint commissioners of the Supreme Court to assist the judges in the performance of their duties, and the act of 1889 (Acts of 1889, p. 41), assuming to confer that power, is unconstitutional.

SAME.—*Supreme Court Commission Unconstitutional.*—Commissioners of the Supreme Court are unknown to the Constitution, and the Legislature can not create such offices and invest the officers with judicial powers.

SAME.—*Legislature can not Confer Judicial Powers.*—No body not provided for by the Constitution can exercise any part of the judicial power of the State. The Legislature has no judicial power and can confer none.

SAME.—*Duties of Supreme Court.—Can not be Delegated.*—Under the Constitution (section 5, article 7), the Supreme Court must decide for itself all questions of law and fact, and none of its judicial duties can be delegated to any other body or performed by deputies.

SAME.—*Judicial Deputy.*—There is no such thing in jurisprudence as a deputy judge.

L. T. Michener, Attorney General, *A. C. Harris*, *W. H. Calkins*, *F. Winter* and *J. H. Gillett*, for relator.

W. P. Fishback, *W. E. Niblack*, *J. R. Coffroth*, *J. D. New*, *R. Lowry* and *M. Nye*, for respondents.

ELLIOTT, C. J.—This action brings before us for judg-

118	350
119	538
121	30
122	469
118	350
125	447
125	572
127	508
118	350
128	18
118	350
130	209
130	442
118	350
131	479
132	509
133	188
118	350
135	131
135	536
136	50
136	580
118	350
151	686
118	350
161	242
118	350
168	542
168	577
118	350
170	147

The State, *ex rel.* Hovey, v. Noble *et al.*

ment the constitutionality of the act of the General Assembly, entitled "An act providing for the appointment of commissioners of the Supreme Court, and concerning matters connected therewith, and declaring an emergency." Acts of 1889, p. 41. The first section of the act assumes to create the offices of commissioners of the Supreme Court, and to provide for the appointment of persons to fill them by the General Assembly. One clause of this section reads thus: "It shall be the duty of such commissioners, under such rules and regulations as the Supreme Court shall adopt, to aid and assist that court in the performance of its duties." Another clause declares that the "commissioners shall respectively hold their offices for the term of four years, and until their successors are elected and qualified." It is also provided in this section that "If a vacancy shall occur in any one of said commissionerships hereby provided for, during a recess of the General Assembly, the Governor shall appoint some properly qualified person to fill said office until the next session of the General Assembly." It is also provided in the first section that "they shall each receive a salary equal to that of a Judge of the Supreme Court." The second section enacts that "The duties to be done and the work to be performed by such commissioners shall be such as the Supreme Court shall assign or appoint, but in no event shall such duties and work be in any way binding or conclusive upon the said Supreme Court." Section three directs that rooms and stationery shall be provided for the commissioners. The fourth section requires the librarian to furnish them with "such books as may be required for their convenient and ready reference." Section five reads thus: "Such commissioners shall be authorized to appoint a messenger at a salary of six hundred dollars per year, and such other assistants as they may deem necessary for the convenient and expeditious performance of their duties." Section six makes an appropriation "to meet the payments required by the provisions of this act."

The State, *ex rel.* Hovey, v. Noble *et al.*

Section 1 of article 7 of the Constitution vests the judicial power of the commonwealth in the courts. It ordains that "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such other courts as the General Assembly may establish." The effect of this provision is to vest in the courts the whole element of sovereignty known as the judicial, established by the Constitution and the laws enacted under it, except in a few instances, where powers of a judicial nature are expressly and specifically lodged elsewhere. *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 463 (52 Am. Rep. 49). One element only of the three which compose our governmental system is vested in the courts, but to no other department is more than one element given. Each of the three departments has all there is of the element assigned it, but it has nothing more. Each department has, it is true, incidental rights of a nature intrinsically different from the body of the power distributed to it, but these incidental rights are such only as are necessary to enable it to perform its functions as an independent branch of the government, and are, in fact, part of the principal power itself. Of the element of sovereignty, which is exclusively and intrinsically judicial, the people gave the courts all they had to give.

The domain of the judiciary is not so extensive as that of the other departments, but no other power can enter that domain without a violation of the Constitution, for within it the power of the judiciary is dominant and exclusive. The element of governmental power given to the judiciary is almost unfettered. Of all the enumerated departments of government—and ours is from the foundation upward a government of enumerated and distributed departments—the judicial is the least trammelled by constitutional limitations. Less extensive than others, it is freer from restraints. Few limitations circumscribe its powers and fewer restrictions trammel its functions. It is true that the judicial department is not absolutely supreme; outside of its sphere it

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is, indeed, without power, but no one of the departments is supreme in the strict sense, for the supreme power is in the people. No one department has, or can have, until the people shall change their organic law, all the powers of government, for those powers are carefully divided and clearly distributed. To affirm the contrary is to assert that all of section 7 is a collection of meaningless words, and every word of article 3 without meaning. But written constitutions are the product of deliberate thought. Words are hammered and crystallized into strength, and if ever there is power in words, it is in the words of a written constitution. Behind the words is the power of a free people operating through the medium of a constitutional convention, called together for the purpose of framing a fundamental and inviolable system of government. Of all governmental instruments it is the most solemn and powerful. Its grants are unalterable, its delegations of power unchangeable and its commands supreme. Until the people themselves shall change or annul their constitution, all must obey its mandates. "All power," says the first section of our Bill of Rights, "is inherent in the people." Our Constitution, therefore, is one in which "the people are recognized as the fountain of all law and authority, and a large proportion of the citizens, determined by the sovereign body, exercise the powers of government by representation." Jameson Const. Conv., section 70. In the legislative department the sovereign body is represented by the General Assembly, in the executive department it is represented by executive and administrative officers, and in the judicial department it is represented by the courts. "The powers of the government," ordains our Constitution, "are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution

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expressly provided." Const., art. 3. The words employed are clear and strong. There is more than a mere theoretical separation, or else words are powerless and constitutions mere empty fulminations. The provisions of the Constitution we have quoted, taken in connection with those which prescribe, define and limit the powers of the other departments of government, remove all doubt and make it incontrovertibly plain that the courts possess the entire body of the intrinsic judicial power of the State, and that the other departments are prohibited from assuming to exercise any part of that judicial power.

The authorities sustain our conclusion, for there is neither conflict nor clash of opinion, nor is there even diversity. The difficulty is not to find authority, but to select cases which best express the universal doctrine that all judicial power is exclusively in the courts, and that the departments of government are absolutely separate and distinct. Said the Supreme Court of Nebraska: "The powers of the State government are divided into three distinct departments—the legislative, executive and judicial, and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the Constitution. Under this division of distinct departments of the government, the apportionment of power to one department will of itself imply an inhibition of its exercise by the others." *Turner v. Althaus*, 6 Neb. 54. One of the greatest of American judges, GIBSON, C. J., said: "But the judicial power of the commonwealth is its whole judicial power; and it is so distributed, that the Legislature can not exercise any part of it." *Greenough v. Greenough*, 11 Pa. St. 489. "Does any one suppose," says the Supreme Court of Illinois, "that this State can rightfully confer judicial power on any other courts than those provided for and created under our fundamental law?" At another place in the same opinion it is said, in speaking of a section of the Constitution of Illinois: "This section has exhausted

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the judicial power of the people of the State. It is there fully disposed of, leaving no residuum." *Missouri River Tel. Co. v. National Bank*, 74 Ill. 217. "If there is any one proposition immutably established," said SAWYER, J., "I had supposed it to be, that the judiciary department is absolutely independent of the other departments of the government." *In re Pacific R. W. Com.*, 32 Fed. Rep. 241, 267. In speaking of constitutional courts, the Supreme Court of Alabama said: "These judicial tribunals are established by the Constitution, owe their existence to that instrument alone, and are in no wise dependent upon the act of the General Assembly." It was also said in the same case, in speaking of the courts, that "Some are established by the Constitution itself—that is, by the people. They do not depend on legislative enactment for existence. They are created at the same time and in the same way with the Legislature itself. They are of the same grade in the sovereign power. They are a constituent branch of the government itself. The government under the Constitution is not complete without them." *Perkins v. Corbin*, 45 Ala. 103.

This court has ever been consistent and firm in maintaining the independence of the judiciary, and in enforcing the provisions of the Constitution which distribute the governmental powers. In *Wright v. Defrees*, 8 Ind. 298, it was said: "The powers of the three departments are not merely equal—they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other." The court said, in the case of *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185, 197, that "These departments of government are equal, co-ordinate, and independent." This doctrine has been asserted and enforced again and again. *Kuntz v. Sumption*, 117 Ind. 1; *Smythe v. Boswell*, 117 Ind. 365, and cases cited; *Ex Parte Griffiths, ante*, p. 83, and cases cited; *Smith v. Myers*, 109 Ind. 1. This court has not only maintained the independence of the judiciary, but it has with equal firmness and consistency asserted the

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independence of the other departments. In *Butler v. State*, 97 Ind. 373, we held that the courts could not suspend a sentence, because the power to grant pardons and respites was vested in the executive, and in cases much too numerous for citation it has been held that the court will neither perform a legislative act nor assume to interfere with matters of governmental policy or expediency. But it is not the courts alone that assert these doctrines; they are found in the works of every philosophical writer on government. Lieber *Civil Liberty*, 154; Montesquieu *Spirit of Laws*, 33; Ingersoll *Fears for Democracy*, 23; Wilson *Congressional Government*, 12, 36; 1 Bryce *Am. Com.* 31; 3 Burke *Works*, 110.

We have, perhaps, devoted more time than is necessary to discussing and illustrating the proposition that the judiciary is an independent department of the government, and that the whole judicial power of the State is exclusively vested in the courts, since the proposition is one that neither lawyer nor publicist will challenge; but the importance of the proposition supplies an apology, if, indeed, apology be needed. The principle embodied in our proposition controls many phases of the case. Among other conclusions to which it leads is this central and ruling one: Neither the executive nor the legislative can select persons to assist the courts in the performance of their judicial duties. Grant—and this can not be granted save for mere argument's sake—that it is true that the act before us contemplates that the commissioners shall be mere assistants of the court, occupying, as is so earnestly and at so much length insisted, positions analogous to those of master commissioners or masters in chancery, and it must follow that such assistants shall be selected by the court, and that neither the Governor nor the Legislature can choose them for the court. From this conclusion there is no escape save by a denial of the independence of the judiciary and an overthrow of the fundamental principle that the whole judicial power of the commonwealth is in the courts.

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A department without the power to select those to whom it must entrust part of its essential duties can not be independent. If it must accept as "ministers and assistants," as Lord Bacon calls them, persons selected for them by another department, then it is dependent on the department which makes the selection. To be independent the power of the judiciary must be exclusive, and exclusive it can not be if the Legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants to share with the governing power its functions and duties, the latter kingdom is in no sense independent.

If it be conceded that the right to make choice of ministers and assistants for the court is a legislative power, then neither the judiciary nor the executive can limit its exercise, nor impose restraints upon the legislative discretion. Do but grant the existence of the power, then the extent and the mode of its exercise are, and must necessarily be, entirely matters for legislative determination. If this be so, then the Legislature may select any number of assistants, assign to them whatsoever duties they may see fit, give them access to the records of the court and surrender to them the right to share with it all labors and all duties. Surely, a court thus subject to legislative rule would be a mere dependent, without a right to control its own business and records. But a constitutional court is not subject to any such legislative control. The Legislature can not for any purpose cross the line which separates the departments and secures the independence of the judiciary. It is not the length of the step inside the sphere of the judiciary that summons the courts to assert their constitutional right and demands of them the performance of their sworn duty, for the slightest encroachment is a wrong to be at once condemned and resisted. As Daniel Webster said, and Mr. Calhoun substantially repeats, the "encroachment must be resisted at the first steps." A

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thoughtful English writer, who has studied our governmental treatises and judicial decisions with great care, and who has calmly surveyed the subject from the point of view of a disinterested and impartial observer, says, in speaking of our State constitutions, that: "But in America, a Legislature is a Legislature and nothing more. The same instrument which creates it creates also the executive, Governor and the judges. They hold by a title as good as its own. If the Legislature should pass a law depriving the Governor of an executive function conferred by the Constitution, that law would be void. If the Legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual." 1 Bryce Am. Com. 429.

The principle that it is the right of the courts to select their own assistants was held to extend to the appointments of janitors by the Supreme Court of Wisconsin. *In re Janitor*, 35 Wis. 410. The Supreme Court of Missouri has held that the exclusive power of the legislative courts does not go to that extent, but it does not deny the general right of the courts to select those who share its duties as ministers and assistants. *State v. Smith*, 82 Mo. 51. The Court of Appeals, in a strongly reasoned case, declared a different doctrine, holding that the court had a right to select its janitor, and that court supported its decision by authority and by weighty arguments. *State v. Smith*, 15 Mo. App. 412. But, conceding the soundness of the decision in *State v. Smith*, *supra*, it must still be affirmed that it is not applicable here, for that decision proceeds entirely upon the ground that the criminal court (the court which asserted the right to appoint a janitor) was a statutory tribunal and not a constitutional court. The decision in *Commissioners v. Hall*, 7 Watts, 290, in principle strongly supports the judgment of the Court of Appeals, as does the decision in *State v. Smith*, 5 Mo. App. 427. But the case before us does not require us to do more than affirm, that where assistants are necessary to enable judges to discharge their duties as judges, the court must

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choose those assistants. Since the time of Queen Elizabeth courts have appointed masters in chancery, and masters in chancery and master commissioners now are, and have always been, appointed by the Federal courts. Our own law has from the earliest years of the State recognized, as it does still, the right of the judiciary to select masters in chancery and master commissioners. The acts of 1881 and 1883, under which commissioners for this court were appointed, expressly recognized this right as one vested in the courts. If practical exposition of a Constitution is ever of force—and no one will deny its force—it is here of controlling effect, for the practice has been uniform and unbroken for centuries before the adoption of the Constitution, and for all the years that have followed its adoption courts have possessed and exercised, as part of the judicial power, the right to select assistants.

Proceeding still further upon the concession which we have provisionally made—and made simply for argument's sake—we affirm that the power to appoint the “ministers and assistants” of the judges is a judicial power, and was a judicial power when the Constitution was adopted. We assert, as a conclusion necessarily following from the proposition we have affirmed, that when the framers of the Constitution declared that the judicial power was vested in the courts, they invested this power in the judiciary as it then existed, and that this investment conferred upon the courts the exclusive power to choose their own ministers and assistants. We suppose no one will deny that the courts, from the earliest ages of the law, have possessed the power to appoint referees, receivers, commissioners, and all other like ministers or assistants, and that they possessed this power because it was a judicial power. If it was not a judicial power it could not have resided in the courts, for courts have no other power.

It is a mistake to suppose that a court possesses merely the power to hear and decide causes. The power is much more extensive. Bouvier thus defines judicial power: “Belonging

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to or emanating from a judge as such ; the authority vested in a judge." Webster's definition of the word judicial is this: "Pertaining to courts of justice, as judicial power," and, "proceeding from a court of justice, as a judicial determination." Speaking of these definitions, the Court of Appeals of New York said: "Whatever emanates from a judge as such, or proceeds from courts of justice, is, according to these authorities, judicial." *In the Matter of Cooper*, 22 N. Y. 67, 82. In the case of *Striker v. Kelly*, 2 Denio, 323, it was said, in answer to an objection that courts could not exercise the power of appointing commissioners: "It might be objected with equal plausibility that the appointment of referees was an executive and not a judicial act." "The principle to be deduced from these extracts," says the Court of Appeals of New York, "obviously is, that where any power is conferred upon a court of justice, to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power." At another place in the same opinion it is said: "Attorneys and counsellors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may with propriety be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions." *In the Matter of Cooper, supra.* It is, however, unnecessary to multiply authorities, for it can not be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners.

In employing the term "the judicial power," the Constitution refers to the power as it then existed. Constitutions do not create institutions, but are formed by organized society,

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and refer to the existing condition of affairs. Cooley Const. Lim. (5th ed.) 47; *Durham v. State, ex rel.*, 117 Ind. 477. A constitution, says Judge Cooley, "assumes the existence of a well-understood system which is still to remain in force and be administered." Cooley Const. Lim. (5th ed.) 73. Our Constitution, therefore, assumes that "a judicial power" was already in existence, and refers to the power as it then existed. It means the power which the people understood to be vested in judges, for no other power is judicial. As the judicial power embraced the authority to select "ministers and assistants" at the time the Constitution was adopted, that right was sanctioned and confirmed, for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assistants, and the Constitution has secured and confirmed that principle beyond the power of the Legislature to shake it. As Webster says: "Written Constitutions sanctify and confirm great principles, but the latter are prior in existence to the former."

Counsel for the defendants refer us to the case of *Taylor v. Com.*, 3 J. J. Marsh. 401, where it is held that the appointment to office is intrinsically an executive function. Other courts have asserted a like doctrine. Thus, it was said in *State v. Barbour*, 53 Conn. 76, that "Appointments to office, by whomsoever made, are intrinsically executive acts." But if we were to accept this doctrine as correct, and give it full application, then it would completely destroy the claim of the defendants, for if the right to appoint can never be anything else than an executive act, the attempt of the Legislature to appoint the claimants was utterly abortive. But we do not understand the authorities to assert that the selection of officers is always an executive act; on the contrary, the authorities hold that, while the power is intrinsically executive, it may be exercised by a court or by a legislative body, as an incidental power of an independent

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department of the government. No one would, we confidently assume, be so bold as to assert that the Legislature may not appoint officers connected with its duties and proceedings, and there is no more reason for denying the power to the courts than there is of denying it to the Legislature. The truth is, that all independent departments have some appointing power, as an incident of the principal power, for without it no department can be independent. *State v. Barbour, supra*; *Achley's Case*, 4 Abbott Pr. Rep. 35. We are not here dealing with the general power to appoint, but we are dealing with a single phase of the general question, and we do no more than affirm that each department must have, and does have, some appointing power, and that where an appointment is essential to the proper exercise of a judicial duty, the court concerned has authority to make the appointment. If this be not true, then no court can appoint a guardian, an administrator, a receiver, a referee, an appraiser or a commissioner. It is, in truth, impossible to conceive of the existence of an independent judicial department without the power to make some appointments. The denial of this incidental power is the annihilation of judicial independence.

Thus far we have proceeded upon the theory, and it is the one most earnestly pressed by counsel, that the commissioners are mere assistants of the court, and we have shown that, even on that theory, which, for argument's sake, we provisionally conceded to be correct, the act is clearly and undoubtedly unconstitutional. We now deny the validity of the theory and assert that the defendants have built upon an assumption that can not be sustained.

The assumption that the Supreme Court can perform its judicial duties through the medium of masters in chancery or master commissioners, or persons charged with duties like those performed by masters in chancery and master commissioners, is without foundation. If it can not thus perform judicial duties it can perform none, for its duty and its power are exclusively judicial. The Supreme Court must

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decide for itself all questions of law and of fact. The facts must be gathered from the record by the court itself, and can not be obtained from any other source or by any other persons than the judges. It is a court of errors, an appellate tribunal, charged with the duty of deciding cases upon the record, and this duty can not be performed by deputies. Independently of any constitutional provision this would be so, because judicial powers can not be delegated. This principle has been established for ages. Chancellor Kent thus states this familiar rule: "The general rule is, that judicial offices must be exercised in person, and that a judge can not delegate his authority to another. I do not know of any exception to this rule with us." 3 Kent Com. (12th ed.) 457; Broom Legal Maxims, 841; *Campbell v. Board, etc., ante*, p. 119; *Hards v. Burton*, 79 Ill. 504. Those who are chosen by the people to sit as judges must themselves discharge all the judicial duties of their offices. The trust is imposed upon them, and they can not share their judicial duties with any person. The people have a right to the judgment of those whom they have made judges, and this right the judges can not surrender, if they would, without a flagrant breach of a sworn duty. The trust is a personal one, inalienably invested in the persons selected by the people, and it can not be delegated by the judges themselves nor by any one else for them. "It is only the appointed judge," says Chief Justice RYAN, "who can speak the authoritative word of the law." *Van Slyke v. Trempealeau, etc.*, 39 Wis. 390. But centuries before, and at a time when the king was the fountain of judicial power theoretically and sat in the courts of law and equity, Sir Edward Coke even more emphatically stated the rule. Said that "gladsome light" of jurisprudence, "the judicature only belongeth to the judges." 4 Inst. 73. Matthew Bacon said: "The king himself, though he be entrusted with the whole executive power of the law, can not sit in judgment in any court, but his justice, and the laws, must be administered according to the power commit-

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ted to and distributed among his several courts of justice." 2 Bacon Abridg. 619. Again we quote from this high authority, who, speaking of the judges, says: "They can not act by deputy, nor any way transfer their power to another." 2 Bacon Abridg. 620.

The theory of our governmental system, as embodied in our Constitution, requires that the persons to whom the people have entrusted the judicial power shall themselves exercise it, and not entrust its exercise to others. Our Constitution expressly so ordains. Its words are these: "The Supreme Court shall, upon the decision of every case give a statement in writing of each question arising in the record of such case and the decision of the court thereon." Const., art. 7, sec. 5. The decision must be that of the court, and so must be the statement upon each question "and the decision thereon." The power of deciding, the duty of deciding, and the duty of writing the opinions, are specifically imposed upon the court. A duty imposed upon a department of government must be performed by the chosen officers of that department, and it can neither be delegated nor surrendered. Cooley Const. Lim. (5th ed.) 116, 139. Where a specific duty is imposed upon a tribunal, by that tribunal it must be performed, without calling any one to perform it or assist in its performance. *Conroe v. Bull*, 7 Wis. 354; *Kearns v. Thomas*, 37 Wis. 118; *Attorney General v. McDonald*, 3 Wis. 703.

We know judicially that our Constitution was so amended as to invest the Legislature with power to create courts superior to the circuit courts, and that this was done for the purpose of enabling litigants to have appeals disposed of by a constitutional tribunal. It can not be unknown to any one that all the departments of the government believed that the only method of administering the laws was by courts created under the provisions of the Constitution, and this belief the people confirmed by their votes in favor of the constitutional amendment. This supplies strong reasons for holding, as we do, that no body not provided for by the Con-

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stitution can exercise any part of the judicial power of the State.

In the last of the many briefs submitted in behalf of the defendants, it is said, that "Counsel fell into error—doubtless by inadvertence—in assuming that either the writer, or any of his associates, intimated anywhere in any of their briefs, that the Legislature may have contemplated the performance by them, or that they might be assigned by the court to the performance, of any other duties than such as are similar to those which were performed by the members of the former commissioners of this court." Without stopping to quote from the briefs the portions (and many pages are devoted to establishing the proposition) which assert that the commissioners are to be assistants of the court, with powers analogous to those of master commissioners, we declare that, whatever view be taken, the act is utterly void, for it is, as we have shown, not within the power of the Legislature to select assistants to share with the court its duties and functions, nor is it within the power of the Legislature to delegate the duty of deciding cases or of giving decisions expression in writing to officers or tribunals unknown to the Constitution.

It is apparent from what we have said that it is exceedingly difficult to give the act a definite and intelligent construction. None has been given it, and none can be given it that will sustain its validity. But this much is clear, it assumes to create offices, to provide for the appointment of officers, and assumes to give to each of the officers a compensation equal to that of a judge of the highest court in the State. One of the sections—the fifth—assumes, indeed, to constitute the persons chosen an independent body, and to invest them with powers greater than those conferred upon the Supreme Court. The ultimate fact is, that the act assumes to create offices and invest the officers with judicial powers. The attempt, to vary somewhat our statement, although veiled and somewhat obscure, is to create a body with judicial power, and to invest officers with judicial rights and functions. The

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tribunal and the officers are unknown to the Constitution. The attempt is unavailing, for it has been steadily held that, as said by HOWK, J., in *Vandercook v. Williams*, 106 Ind. 345, "Judicial officers only can exercise judicial powers or functions." Or, as said in other cases, "The judicial functions meant by the Constitution are such only as courts and judges exercise. A judicial duty within the meaning of the Constitution is such a duty as legitimately pertains to an officer in the department designated by the Constitution as judicial. By this designation is meant the judiciary in the true sense of the term." *Wilkins v. State*, 113 Ind. 514; *Smythe v. Boswell*, 117 Ind. 365, and cases cited; *Campbell v. Board, etc., supra*, and cases cited; *Wight v. Wallbaum*, 39 Ill. 555. Our Constitution vests the judicial power of the State not in officers, but in courts. In speaking of the constitutional provision, in *Waldo v. Wallace*, 12 Ind. 569, the court said: "It will be observed that the judicial power is vested in courts, not in officers." It is clear that the common law so vested it, and that the Constitution there continues it. Cooley Const. Lim. (4th ed.) 74. If the duties assumed to be assigned the commissioners are judicial, then they must constitute a court, since only courts can exercise judicial power; but, as no such court is recognized by the Constitution, it can have no legal existence. If, however, it be conceded that the tribunal which the act assumes to establish is a court, then the instant the act took effect the offices of the judges of that court were vacant. *Rice v. State*, 7 Ind. 332; *Driskill v. State*, 7 Ind. 338; *Stocking v. State*, 7 Ind. 326; *State v. Irwin*, 5 Nev. 111. If the act does establish a court, then its members are judges, and if judges, they must be appointed by the Governor, and by no other power, for, as decided in the cases cited, the clause of section 18 of article 5 of the Constitution, which reads thus, "Or when, at any time, a vacancy shall have occurred in any other State office, or in the office of a judge of any court, the Governor shall fill such vacancy by appointment," vests the appointing power

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in the Governor. In two methods, and two only, can judges be chosen—by the people and by the chief executive, and by the latter only where there is a vacancy. If the commissioners are judges, they have no title; if they are not judges, they can exercise no judicial powers or functions. But the act does not establish a court nor create judges; it is simply an attempt to appoint deputy judges, and a deputy judge is a thing unheard of in jurisprudence, and unknown to the Constitution. A plan similar to the one which the act before us professes to outline was recently proposed to the bar of New York, and it was condemned as unconstitutional. The opinion of Mr. Moak, one of the leaders of the bar of the State, that “New officers not authorized” by the Constitution “can not be created,” was accepted and adopted. In an editorial comment upon this proposed plan it was said: “All hands conceded it to be unconstitutional when they came to think of it.” 39 Alb. L. J. 257, 242.

The Constitution vests the judicial power in every instance, and the Legislature in none. The Legislature has no judicial power, and can confer none upon any person or tribunal. Under the Constitution it may establish courts, but it does not invest the courts with judicial power; the Constitution alone can do that, for all judicial power comes from that instrument and is vested by it in courts and judges. Speaking of the mayor of a city, the Supreme Court of Illinois said: “Unless he was such a judge, or a justice of the peace, no law could vest him with judicial powers, for in those officers alone is the entire judicial power of the State vested by the Constitution. As mayor alone, the law would be as incompetent to vest him with judicial power, as it would the Governor or speaker of the house of representatives. The Constitution itself has disposed of the entire judicial power of the State, and has exhausted that subject. The Legislature may multiply some of the officers who are by the Constitution vested with judicial powers, but when this is done, it is the Constitution which vests the power.” *Peo-*

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ple v. Maynard, 14 Ill. 419. It is the Constitution, and not the Legislature, which makes the investiture, and it is the courts and judges who are invested with the judicial power. *Shoultz v. McPheeters*, 79 Ind. 373; *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. Rep. 162); *Little v. State*, 90 Ind. 338; *Pressley v. Lamb*, 105 Ind. 171, and authorities cited, pp. 185, 186; *Kuntz v. Sumption, supra*; *Smythe v. Boswell, supra*; *Campbell v. Board, etc., supra*; *Hall v. Marks*, 34 Ill. 358; *Ex Parte Griffiths, supra*. As the Constitution, of its own vigor, and as the sole source of the judicial power, vests that power in designated tribunals, the Legislature can neither vest it elsewhere nor create new judicial offices, nor divide the duties of the judicial offices designated by the Constitution. In *People v. Bolton*, 55 N. Y. 50, the principle stated by us was thus expressed: "The Constitution can not be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the Constitution." In many other cases this doctrine has been asserted. *Warner v. People*, 2 Denio, 272; *People v. Draper*, 15 N. Y. 532; *People v. Keeler*, 29 Hun, 175; *State v. Brunst*, 26 Wis. 412; *King v. Hunter*, 65 N. C. 603 (6 Am. Rep. 754). Our Constitution vests the highest appellate jurisdiction of the State in a Supreme Court, and provides that the number of judges shall not be more than five; there can, therefore, be no other Supreme Court than the one established by the Constitution, and it must be composed of five judges and no more. There is, consequently, no such officer under the Constitution as a Supreme Court Commissioner, and there can be no division of the duties of the Supreme Court, and a distribution to any person other than the judges of that court, chosen as the Constitution provides.

The people have a right to the courts established by and under the Constitution, and this constitutional right the Leg-

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islature can neither alter nor abridge. Constitutional tribunals can not be changed by legislation, and the Supreme Court is a constitutional court. It can be composed of judges only, for only judges can constitute a court. No part of the judicial duties of that court can be assigned to any other person than one of the duly chosen judges. The Legislature has no power to change its organization, nor can that body, under the guise of creating commissioners, divide the duties of the judges, nor authorize it to be done. Under our Constitution, as amended, the Legislature may establish courts, but it can not destroy the constitutional courts—the circuit courts and the Supreme Court—nor can it change their organization nor redistribute their powers, for these courts owe their organization to the Constitution, and as the Constitution has ordained that they shall be organized, so they shall be. Judicial power distributed by the Constitution is beyond legislative control.

In discussing the general subject, the Court of Errors of New Jersey said, referring to constitutional provisions similar to our own, that: “In an examination of these sections the first thing which attracts attention is this: that the instrument itself establishes certain courts. It does not leave that all-important work to other hands. An omission in this respect in the Constitution would have left the judicial system without any fixity whatever. In such a state of things, the powers, jurisdiction, and even the very existence, of the several courts would have been placed under the control of the Legislature. They could have been altered or abolished by that body at will. But the convention had no such purpose as this, and they, therefore, enumerated the superior tribunals in which was principally to reside the judicial power of the government. By that enumeration those tribunals became constitutional courts, that is, courts that could not be altered or abolished, except by an alteration of the instrument creating them. The peculiar quality

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of a constitutional court, or of any other constitutional establishment, is this, that it is not susceptible of change in its fundamental principles, except in some prescribed mode. Thus, for example, the nature of this court, or the nature of the Supreme Court, can not be altered in any way but one, that is by a modification of the Constitution itself. It is presumed that no professional gentleman would, for an instant, contend that the Legislature could deprive the decrees and judgments of this court of their quality of being conclusive, or could take from the Supreme Court any of those prerogative writs by which inferior jurisdictions are superintended and regulated. The power to do this would involve the power to modify in essential particulars the constitution of these courts; a power not to be distinguished from an authority to supersede or abolish. It is entirely clear that the Legislature has not the competency to impair the essential nature or jurisdiction of any of the constitutional courts. To this extent, it seems to me, the subject is too plain for discussion." *Harris v. Vanderveer*, 21 N. J. Eq. 424. This doctrine finds support from many courts, but time will not allow us to quote at length from the many decisions, and we can do no more than refer to a few of them. *Hutkoff v. Demorest*, 103 N. Y. 377; *State v. Gannaway*, 16 Lea, 124; *Landers v. Staten Island R. R. Co.*, 53 N. Y. 450; *In Matter of Application of Senate*, 10 Minn. 78; *In Matter of Senate*, 9 Col. 623.

The question which faces us is not one of discretion, but of imperative duty. The duty of maintaining the separation of the departments of the government and the integrity and existence of the courts as established and organized by the Constitution, is one of the most important that the judiciary is required to perform. It is the duty of the courts to uphold the Constitution as it is written, and to yield no part of their right or authority. Judges are chosen for the purpose of maintaining the limitations of the Constitution, without which free government can not exist. As said by the Court

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of Appeals of New York : “ If this provision were intended solely for the protection of the court or its judges they might waive it ; but we do not think it was so intended. It was, in our judgment, like the whole judicial system of the State, intended for the benefit of the people, and to secure to litigants a forum in which they might have their controversies adjudged. The jurisdiction which the Constitution preserves in the courts named is inalienable, and carries with it the corresponding duty on the part of those courts to exercise it, when called upon in proper form to do so.” *Alexander v. Bennett*, 60 N. Y. 204.

It is contended with much force, and the contention is well supported by authority, that the General Assembly can not delegate any of its functions, that the court can take upon itself no legislative duties, and that the act does require the court to prescribe by legislation the duties of the commissioners. *Smith v. Strother*, 68 Cal. 194 ; *In re School Law Manual*, 63 N. H. 574 ; *Gould v. Raymond*, 59 N. H. 260 ; *In re Pacific R. W. Com.*, 32 Fed. Rep. 241 ; *Ex Parte Griffiths*, *supra* ; *Smith v. Rines*, 2 Sumn. 338 ; *Doe v. Considine*, 6 Wall. 458 ; Cooley Principles of Const. Law, 53 ; Cooley Const. Lim. 139, 148 ; Endlich Interp. Statutes, section 22. This question we do not deem it necessary to decide. It is clear to us that there is and can be no such offices as the Legislature has assumed to create, and that the act is in all its parts utterly void.

The writ of prohibition prayed for will issue, and judgment will be entered in the relator's favor.

Filed April 20, 1889.

Clanin v. Esterly Harvesting Machine Company.

118	373
121	325

No. 13,238.

CLANIN v. ESTERLY HARVESTING MACHINE COMPANY.

PROMISSORY NOTE.—*Recital of Consideration.*—*Guaranty.*—An instrument in the ordinary form of a promissory note except that it contains the words “This note given to secure the payment of the Universalist Church debt,” is a promissory note, and not a contract of guaranty, the words quoted being a mere recital of the consideration.

SAME.—*Parol Agreement between Maker and Payee.*—In an action upon such note it is not admissible to aver and prove that the payee agreed, when he received the note, that he would procure another person to sign it, and that it should not become binding on the maker until so signed; nor is it competent to show that the payee agreed to collect subscriptions made by members of the church and apply the proceeds to the payment of the note, but had failed to do so.

SAME.—*Escrow.*—A promissory note may be delivered as an escrow to a third person, but it can not be so delivered to the payee.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

W. H. Charles and W. Bosson, for appellee.

MITCHELL, J.—Reuben Clanin executed his promissory note calling for the payment of \$248.54 in twelve months after date to Samuel Clanin, with eight per cent. interest. The note was in the ordinary form, except that it contained on its face the following stipulation, viz.: “This note is given to secure the payment of the Universalist Church debt.” The payee afterwards assigned the note to the Esterly Harvesting Company, and the latter brought this suit, alleging the execution and assignment of the note, and that it remained due and wholly unpaid.

It is contended, in effect, that the stipulation above set out made the instrument a contract of guaranty, and that the defendant as guarantor was not liable until it appeared that the principal debtor had made default; hence, the argument proceeds, the complaint was demurrable, because it contained

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no averment that the Universalist Church debt had not been paid. This position is not tenable. A guaranty is an independent contract, by which the guarantor undertakes in writing, upon a sufficient consideration, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person, who is primarily liable to pay or perform. *Ward v. Wilson*, 100 Ind. 52; *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332, and cases cited.

The instrument sued on is a written promise by a person named to pay a certain sum of money at a future time, absolutely and without condition, to a payee named, and it has hence all the essential qualities of a promissory note.

The recital on the face of the note, that it was given to secure the payment of the Universalist Church debt, does not render the obligation collateral or conditional. This relates simply to the consideration upon which the note was executed. "It is no objection to a bill or note, that it states the transaction out of which it arose, or the consideration for which it was given." 1 Parsons Notes & Bills, 44; *Haussoullier v. Hartsinck*, 7 T. R. 729; *Wells v. Brigham*, 6 Cush. 6. The demurrer to the complaint was properly overruled.

The answers present substantially the following facts: At the time the note in suit was executed, the church society therein mentioned, at Mier, in this State, was indebted in the sum of \$248.54, for the payment of which the appellant, with other members of the society, were personally bound. It was agreed that Samuel Clanin, the payee of the note, should advance the money to pay the church debt, and that the appellant and one Milton Abbott should execute their notes to him for the amount. The money was advanced according to the agreement, and the appellant signed the note and delivered it to the payee, who, it is alleged, agreed to see Abbott and procure his signature thereto. It is averred that it was agreed that the appellant was not to be bound unless Abbott's signature was obtained; that neither the payee nor any one else ever procured or asked Abbott to

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sign, and that the latter, although solvent, now refuses to sign the note. In addition to the above facts, it is averred in other paragraphs of the answer that divers members of the church society above mentioned had subscribed sums aggregating \$300, which, when collected, were to be applied to the liquidation of the church debt, and that Samuel Clanin, the payee, agreed at the time the note was executed that he would collect the amount of the subscriptions and apply the sums collected to the payment of the note. It is averred that, although the subscribers were, and still are, solvent, the payee of the note has wholly failed to make any effort to collect the subscriptions, and that they have not been collected according to the agreement.

These facts were manifestly insufficient to present any defence to the note. It is an elementary rule that, in the absence of fraud or mistake, a written contract is to have force and effect according to its terms. While it is competent to prove, under proper issues, that a note never was delivered, evidence is not admissible to prove that it was delivered to the payee, who had parted with the consideration, as an escrow, or under any agreement that the maker was not to be bound according to the terms of the note. A note may be delivered as an escrow to a third person, but it can not be so delivered to the payee. *Stewart v. Anderson*, 59 Ind. 375; *Benoit v. Schneider*, 47 Ind. 13; 1 Wait Actions and Defences, p. 565.

It was not admissible, therefore, to aver and prove that the payee agreed, when he received the note, that he would procure another person to sign it, and that it was not to become binding on the maker until it was so signed. Nor was it competent to defeat the collection of the note by proof that the payee had agreed to collect the subscriptions made by members of the church, and apply the proceeds to the payment thereof. Such proof would effectually displace the writing by substituting in its stead a parol agreement of an entirely different character. This can not be done. *Singer*

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Mfg. Co. v. Forsyth, 108 Ind. 334; *Carr v. Hays*, 110 Ind. 408; *Tucker v. Tucker*, 113 Ind. 272. If the payee had collected the subscriptions in pursuance of the alleged agreement, a different question would have been presented. *Tucker v. Tucker, supra*. There was no error in sustaining the demurrer to the answers.

The judgment is affirmed, with costs.

Filed April 23, 1889.

No. 13,338.

McKINLEY v. THE FIRST NATIONAL BANK OF CRAWFORDSVILLE.

INTERROGATORIES TO JURY.—*Mistake in Answer.—Correction of.—Affidavits of Jurors.—New Trial.*—The jury returned a general verdict for the defendant and also returned answers to interrogatories propounded to them. The plaintiff moved for judgment on the interrogatories and answers. The defendant moved to correct the answer to an interrogatory by striking out the word "yes" and inserting the word "no," and filed affidavits of all the jurors that the answer agreed upon was "no," but that by inadvertence "yes" had been written. The motion to correct was overruled and judgment rendered for the plaintiff on the special verdict, the answers as returned being inconsistent with the general verdict. A motion for a new trial was denied.

Held, that affidavits of jurors will not be received to impeach their verdict, and that the trial court ruled correctly. ELLIOTT, C. J., dissents, on the ground that, with the general verdict in his favor, the defendant should have been awarded a new trial.

From the Montgomery Circuit Court.

J. Wright and *J. M. Seller*, for appellant.

G. W. Paul, *J. E. Humphries* and *W. M. Reeves*, for appellee.

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OLDS, J.—This is an action on a promissory note executed by the appellant and one Burkholder to the appellant for \$7,150, dated December 27th, 1882, with eight per cent. interest and attorney's fees.

The complaint is in the usual form. The appellant answered in two paragraphs.

The first paragraph alleges that, prior to the 5th day of August, 1882, the defendant and Burkholder were in partnership in the lumber business, and that they, said defendant and Burkholder, were indebted to the plaintiff, the appellee, in the amount of the note sued upon, evidenced by several notes; that, upon said last named date, said defendant sold his interest in said lumber business to his partner, Burkholder, and Burkholder executed to him his note, in payment of such interest, in the sum of \$3,915; that plaintiff was desirous of collecting the amount owed by said Burkholder and McKinley to the plaintiff, and a contract was entered into between all of said parties, by which it was agreed that Burkholder should make sale of the stock of lumber and timber on hand, and the said plaintiff should make all collections for such sales, and should apply the amount so collected as follows: One-fifth to the payment of said \$3,915 note due McKinley, and four-fifths of the amount so collected to the indebtedness due the plaintiff from the firm of Burkholder & McKinley; that the note sued upon was given in renewal of the notes then held by the plaintiff against Burkholder & McKinley, and the consideration for said notes held against the firm of Burkholder & McKinley August 5th, 1882, is the same consideration as the consideration for the note sued upon; that said Burkholder made sale of said lumber and timber on hand, and the plaintiff collected the money on such sales, amounting to \$17,000, four-fifths of which amount, if applied to the payment of said notes and indebtedness, as agreed upon, would have more than paid and satisfied the same.

The second paragraph alleges substantially the same facts,

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and that all except \$2,000 of said indebtedness of Burkholder & McKinley had been paid prior to the execution of the note sued on; that defendant signed the note without reading it, supposing and believing it to be only for the balance due on said indebtedness, and that there was no consideration for the note except the sum of \$2,000, which had been fully paid.

Plaintiff replied to the answers by denial. Trial by jury, resulting in a general verdict for defendant, and answers to special interrogatories; motion for judgment for the plaintiff on the interrogatories and answers, notwithstanding the general verdict; motion sustained and judgment for the plaintiff. After verdict, and before judgment, defendant moved the court to correct the answer to interrogatory No. 24, by striking out the word "yes" and inserting in lieu thereof the word "no," for the reason that the jury agreed to answer said interrogatory "no," and that by inadvertence and mistake the word "yes" was written and returned as the answer, and filed an affidavit signed and sworn to by each of said jurors in support of said motion, to the effect that the answer agreed upon by said jury to said interrogatory was "no," and by mistake it was written "yes," and not discovered until after the jury was discharged, which motion was overruled, and the ruling was assigned as one of the causes for a new trial.

The interrogatories and answers thereto are in the nature of a special verdict; they have the same force and effect as a verdict, and when inconsistent with the general verdict they control the latter. The changing of an answer to an interrogatory from "yes" to "no" would be equivalent to changing a general verdict by inserting the word "plaintiff" in lieu of the word "defendant," and affidavits of jurors showing that they had agreed upon a verdict in favor of the "plaintiff," and that by inadvertence and mistake they had written the word "defendant," would be a direct contradic-

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tion of their verdict. By the answer to this interrogatory the jury said that "at the time the defendant executed the note sued on he understood that he was executing a note for whatever was the balance then due the plaintiff from Burkholder," and by the change desired to be made the jury would say that the defendant did not understand he was executing a note for whatever balance was then due the plaintiff from Burkholder. It is a direct contradiction of the verdict, or the interrogatory and answer, and this court has repeatedly held that the affidavits of jurors can not be received to impeach their verdict. *Stanley v. Sutherland*, 54 Ind. 339; *Hughes v. Listner*, 23 Ind. 396; *Bradford v. State*, 15 Ind. 347; *Bennett v. State*, 3 Ind. 167. The case of *Withers v. Fiscus*, 40 Ind. 131, is directly in point. In that case it was held that affidavits of jurors can not be received to show that they agreed upon a basis of amount upon which the calculation of the amount to be recovered should be made, and that there was a mistake in the calculation. There was no error in overruling the motion to correct, or, as we regard it more properly, to change the answer to the interrogatory.

It is also urged that the court erred in sustaining the motion for judgment on the interrogatories. We do not deem it necessary to set out the interrogatories and answers in full. The interrogatories and answers thereto are in direct conflict with the general verdict, and find affirmatively all the facts entitling the plaintiff to a judgment for the amount due upon the note, which amount is specifically found and stated by the jury.

Although the affidavit of the jurors was not proper to be considered by the trial court as evidence in support of the motion to change the answer to the interrogatory, yet we have no doubt, in view of its having been filed, that the trial court would not have overruled the motion for a new trial and rendered final judgment had it not been clearly satisfied that the appellee was entitled to the judgment rendered.

 Burkett *et al.* v. Bowen.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 23, 1889.

DISSENTING OPINION.

ELLIOTT, C. J.—I dissent from the conclusion reached in the prevailing opinion, because I think that, with the general verdict in favor of the appellant, the trial court should have awarded a new trial, and not rendered judgment on the answers to interrogatories.

Filed April 23, 1889.

No. 13,662.

BURKETT ET AL. v. BOWEN.

118 379
147 179

EXECUTION.—*Supplementary Proceedings.*—*Affidavit.*—*Amendment.*—The affidavit in proceedings supplementary to execution may be amended.

SAME.—*Return of Nulla Bona.*—The sheriff's return, showing no property found subject to execution, justifies a resort to supplementary proceedings.

SAME.—*Choses in Action in Possession of Third Person.*—Choses in action belonging to the execution defendant and in the possession of a third person are properly reachable by proceedings supplementary to execution.

SAME.—*Change of Venue.*—A change of venue may be granted in proceedings supplementary to execution.

SAME.—*Question of Ownership.*—*Determination of.*—Where the affidavit in supplementary proceedings alleges that property belonging to the execution defendant is in the possession of a third person, it is competent to try and determine the question of ownership.

From the Marshall Circuit Court.

G. W. Holman and *M. R. Smith*, for appellants.

J. Rowley and *M. A. Baker*, for appellee.

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ELLIOTT, C. J.—The appellants' contention that the affidavit in proceedings supplementary to execution can not be amended, is met and overthrown by the decision in *Hutchinson v. Trauerman*, 112 Ind. 21. There is nothing in *Pouder v. Tate*, 111 Ind. 148, opposing the doctrine of *Hutchinson v. Trauerman*, *supra*, for there was no question as to the right to amend.

The affidavit shows that the defendant Milo R. Smith has property in his hands belonging to Daniel R. Burkett, and describes notes, secured by mortgage, amounting to eleven hundred dollars. It is averred that "the sum of eleven hundred dollars, together with the amount already in the hands of Burkett subject to be claimed as exempt from execution, exceeds the amount so exempt by law from execution." It is also shown that the appellee obtained a judgment against Burkett, and that the execution issued on it has been returned "no property found." We think that the affidavit shows that the execution defendant has no property subject to execution. The notes and mortgage exceed the amount exempted by law, and, therefore, the plaintiff would have a right to reach the excess, even if there were no other property owned by the execution defendant, but the case is made clearer by the allegation that there was other property. The return of the sheriff shows that the debtor had no other property subject to execution, and this, under the ruling in *Earl v. Skiles*, 93 Ind. 178, justified a resort to the proceedings in aid of the execution. The fact that the execution was returned "no property," shows, *prima facie*, at least, that the judgment is not enforceable by execution. The notes could not be levied upon in the hands of Smith, and it was, therefore, necessary to aid the execution by supplementary proceedings. The choses in action are shown to be in the possession of a third person, and the execution did not reach them so as to afford the creditor adequate and ordinary relief, although it might have done so if they had been in the hands of the execution defendant. Our opinion is, that the

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affidavit clearly makes a case within the provisions of section 819, R. S. 1881. It shows that an execution was issued and returned "no property," and in other respects employs almost literally the language of the section to which we have referred. The case before us is really covered by the decision in *Fowler v. Griffin*, 83 Ind. 297, where the earlier cases are collected and examined. Objections to the affidavit like these here urged were held to be unavailing. In *Sherman v. Carvill*, 73 Ind. 126, it was held that a return of *nulla bona* entitles the execution plaintiff to invoke the assistance of the court to enforce his judgment. In *Devan v. Ellis*, 29 Ind. 72, an affidavit essentially the same as the one in this record was assumed to be sufficient.

A change of venue may be granted in proceedings supplementary to execution. *Burkett v. Holman*, 104 Ind. 6; *Burkett v. Bowen*, 104 Ind. 184. *Burt v. Hoettinger*, 28 Ind. 214, was expressly overruled in *Fowler v. Griffin*, *supra*, and its doctrine is denied by many later cases.

Under the authority of *Fowler v. Griffin*, *supra*, and other cases, it was proper to try and determine the question of the ownership of the property described in the affidavit. The affidavit before us does not aver, as did the affidavit in *Pounds v. Chatham*, 96 Ind. 342, that the third person is indebted to the execution defendant, but what it does aver is, that the third person has in his possession property belonging to the debtor, so that the cases are essentially different. The affidavit directly brought in issue the ownership of the property. *Fowler v. Griffin*, *supra*; *Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458; *McMahan v. Works*, 72 Ind. 19. It was, therefore, competent to introduce evidence upon the question of ownership. This was, indeed, one of the controlling questions in the case. The change made by the revision of 1881 dispensed with formal pleadings, but it did not change the material features of the proceeding nor did it restrict the rights of the execution plaintiff. In *Burkett v. Holman*, *supra*, the court expressly limited the operation of section

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822 of the revision of 1881, saying: "We are not inclined, however, to extend the provisions of section 822, by construction, beyond the plain import of the language used therein."

Our conclusion is, that the rulings of the trial court were in accordance with the law as declared in our statute and decisions.

Judgment affirmed.

Filed April 23, 1889.

No. 14,837.

THE STATE, EX REL. JAMESON ET AL., *v*. DENNY, MAYOR.

CONSTITUTIONAL LAW.—*Appointment to Office.*—*Power of Legislature.*—The appointment to an office which is in no manner connected with the discharge of legislative duties, involves the exercise of executive functions, and is prohibited to the Legislature by section 1 of article 3 of the Constitution, except in so far as the power of appointment is reserved to it by section 1 of article 15.

SAME.—*Construction of Constitutional Provision.*—The provision of section 1 of article 15 that "All officers whose appointment is not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law," is to be construed in the light of the laws in force at the time the Constitution was adopted, and seems to limit the power of the Legislature to such appointments as it might make under those laws.

SAME.—*Manner of Making Appointment.*—*Power to Provide for.*—The power to provide by law the *manner* or *mode* of making an appointment to a new office created by the Legislature does not include the power to make the appointment itself.

SAME.—*Legislature may not Appoint Local Officers.*—The Legislature has no power under the Constitution to appoint local municipal officers.

SAME.—*Local Self-Government.*—*Right of the People.*—The right of the people to govern themselves, as to matters which are purely local, through the medium of local municipal governments and officers chosen by them-

118	382
118	448
118	480
119	390
121	31
121	36
121	506
122	19
122	30
122	509
118	382
127	506
118	382
130	426
130	457
118	382
131	478
118	382
135	536
118	382
137	557
118	382
141	624
118	382
158	128
158	130
118	382
163	675
118	382
170	603

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selves, was not surrendered upon the adoption of the Constitution, but is still vested in them, and it can not be taken away by the Legislature. **SAME.—Cities.—Public Works.—Legislative Interference.—Invalid Act.**—The act of March 8th, 1889 (Acts of 1889, p. 247), assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works to be chosen by the Legislature from residents of the cities affected, is void, as denying the right of local self-government.

MITCHELL, J., dissents.

From the Marion Superior Court.

J. S. Duncan and C. W. Smith, for appellants.

L. T. Michener, Attorney General, *W. L. Taylor, A. C. Harris, W. H. Calkins, F. Winter, R. O. Hawkins, C. F. Griffin and J. H. Gillett*, for appellee.

COFFEY, J.—On the 9th day of March, 1889, there was filed in the office of the secretary of state what purports to be an act of the General Assembly of the State of Indiana, entitled "An act to establish an efficient board of public works and affairs in all cities of fifty thousand inhabitants or more; providing for the manner of the selection of the members of the board hereby created, and defining their duties, and providing for the selection of their successors; providing for the taking control of and having exclusive power over the construction, supervision, cleaning, repairing, grading and improving all streets, alleys, and highways of every kind and description, and the building of sewers, culverts, bridges, sidewalks and curbing of all streets and alleys; and providing for the abolishment of existing boards of public improvements in such cities; providing for the making of contracts for the lighting of all streets, alleys, public buildings, and public places within such city, and providing for the making of all contracts for the supply of water for all purposes of whatever kind for such city; and abolishing all boards on lights, water-works, and supplies; and providing for the appointment of a legal adviser, a city civil engineer, and superintendent of streets, and repealing so much of section eight (8) of an act entitled 'An act to re-

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peal all general laws now in force for the incorporation of cities, and to provide for the incorporation of cities, prescribing their powers and rights and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto,' approved March 14th, 1867, and amended March 6th, 1877, the same being section three thousand and forty-three (3043) of the Revised Statutes of 1881, as is in conflict with this act; and repealing all laws in conflict herewith, and declaring an emergency." Acts of 1889, p. 247.

The act provides for the establishment, in all cities in this State containing a population of fifty thousand inhabitants or more, of a board of public works and affairs, to consist of three members, selected from the two leading political parties, one member of said board to hold his office for the period of two years from the date of his selection, and the other two members are to hold their office for the period of four years.

The members of such board must have been freeholders of the city at least one year prior to their election, and must have been *bona fide* residents of the city at least five years. Each member of such board is required to execute a bond in the sum of \$20,000, to the approval of the mayor of the city, for the faithful performance of the duties of his office.

The act abolishes all existing boards of public improvements and the office of street commissioner, and confers on the board of public works and affairs thereby created the power to perform all the duties heretofore conferred upon such boards of public improvements and street commissioner. It also gives such board of public works and affairs full power to construct all streets, alleys, avenues, bridges, sewers, drains, ditches, culverts, sidewalks and curbing, and to take charge of the cleaning, repairing, grading and improving of the same, and to make all contracts for the furnishing of lights for the streets, public buildings and public places in the city, and for furnishing water for the city for every purpose. It

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has the exclusive power to employ such superintendents, laborers or other persons as it may deem necessary for the execution of its business, and fix their salaries and compensation.

By the terms of said act the board of public works and affairs is to have the exclusive power and control over the construction, supervision, cleaning, repairing, grading and improving all streets, alleys, avenues, lanes, bridges, drains, culverts, sidewalks and curbing, and the lighting of such public places as may be deemed necessary in such city, and to fix and establish the grades of all streets and alleys, avenues and thoroughfares. It may order and construct the improvement of any street, alley or thoroughfare in the city where a majority of the property-owners affected thereby do not remonstrate.

It has the exclusive power to make all improvements and expenditures. Such board is entitled to possession of all property belonging to the city, used for the purposes named in the act, and it is made the duty of the common council to provide for the payment, out of the city treasury, of all the expenses incurred by the board of public works and affairs.

The act makes it a criminal offence for any person to interfere, in any manner, with said board or its employees in the discharge of their respective duties. It also makes it the duty of the General Assembly of the State to elect the board of public works and affairs, by a joint vote of a majority thereof, and it is made the duty of the speaker of the house and the secretary of the senate to certify such election. In case of a vacancy in such board, it is made the duty of the mayor of such city to fill the same by appointment.

Pursuant to the terms of this act, the appellants were elected by the General Assembly of the State of Indiana as members of the board of public works and affairs for the city of Indianapolis, prepared the bonds therein required and tendered the same to the appellee, as the mayor of said city,

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for his approval. The appellee, as such mayor, declined to approve said bonds, and this action was brought, in the superior court of Marion county, to compel him, by mandate, to discharge that duty. The rulings of said court being adverse to the appellants, they appeal to this court and assign error.

It is conceded that if the act in question is a valid and binding law, and that the appellants were legally elected, the judgment of the court below must be reversed.

Admitting for the time being that the act in question is otherwise valid, it is insisted that, under our Constitution, the General Assembly had no power to elect or appoint the appellants, and that so much of the act as attempts to confer on it such power is in conflict with the Constitution, and is, therefore, void.

It is claimed that the appointment to an office is an executive function, and that by the terms of our Constitution the General Assembly is prohibited from filling an office created by it, unless such office is connected with the duties imposed upon it as a legislative body. This contention arises out of the provisions of section 1, article 3 of the Constitution, which is as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

In the case of *Wright v. Defrees*, 8 Ind. 298, it was said by this court that "The powers of the three departments are not merely equal,—they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other."

In the case of *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185, this court, in speaking of the above constitutional provision, says: "The same division of powers exists in the Federal Constitution, and in most, if not all, of the State

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Constitutions, and is essential to the maintenance of a republican form of government. These departments of government are equal, coördinate, and independent. The duties imposed on each are separable and distinct, and it is expressly provided, that 'no person, charged with official duties under one of these departments, shall exercise any of the functions of another.' The persons charged with the execution of these powers are alike elected by, and are responsible to, the people, in whom resides the sovereignty of the State. This division of power prevents the concentration of power in the hands of one person or one class of persons." The same language is used substantially in *Smith v. Myers*, 109 Ind. 1; *State v. Governor*, 1 Dutch. 331; *Ex Parte Dennett*, 32 Me. 508; *Low v. Towns*, 8 Ga. 360; *Mauran v. Smith*, 8 R. I. 192; *Hawkins v. Governor*, 1 Ark. 570; *Houston, etc., R. W. Co., v. Randolph*, 24 Texas, 317; *People v. Bissell*, 19 Ill. 229; *Dickey v. Reed*, 78 Ill. 261; *Rice v. Austin*, 19 Minn. 103; *Western R. R. Co. v. De Graff*, 27 Minn. 1; *Secombe v. Kittleson*, 29 Minn. 555; *Sill v. Village of Corning*, 15 N. Y. 297; *People v. Albertson*, 55 N. Y. 50; Cooley Const. Lim., star pp. 87, 88, 93, 114, 175; Sedgw. Const. & Statute Constr. (2d ed.) 132, 138, 184.

Legislative power is the power to make, alter and repeal laws, and is vested in the General Assembly. *Lafayette, etc., R. R. Co. v. Geiger, supra.*

Cooley, in his Constitutional Limitations, page 90, says: "The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed." See, also, *Greenough v. Greenough*, 11 Pa. St. 489; *Wayman v. Southard*, 10 Wheat. 1.

In the convention which framed our Constitution, Mr. Biddle, a member, in addressing the convention, said: "The General Assembly has no other duty nor power than to make laws. After a law has been enacted this department has no

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further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books, and for any function still remaining in the legislative power, there it would forever remain. All the power of this department here ends." 2 Constitutional Debates, 1324.

Judicial power is the power to construe and interpret the Constitution and the laws, and make decrees determining controversies, and is vested in the courts.

The executive power is the power to execute the laws, and is vested in the Governor of the State, the administrative officers of the State, counties, townships, towns and cities. Then, to which one of these departments does the appointment to office belong?

If the General Assembly should create an office, by statute duly passed by it, providing that it should be filled by appointment, the act of filling such office is a partial execution of the law.

Webster defines executive—qualifying for, or pertaining to the execution of the laws, as executive power or authority, executive duties. "In government *executive* is distinguished from *legislative* and *judicial*, legislative being applied to the organ or organs of government which makes the laws; judicial to that which interprets and applies the laws; executive to that which carries them into effect."

Mr. Jefferson, in a letter to Samuel Kercheval, dated July 16th, 1816, said: "Nomination to office is an executive function. To give it to the Legislature, as we do (in Virginia), is a violation of the principle of division of powers. It swerves the members from correctness, by tempting them to intrigue for offices themselves, and to corruptly barter for votes, and destroys responsibility by dividing it among a multitude."

Mr. Holman, a member of the constitutional convention, in addressing it, said that it was not the intention to confer the appointing power upon the General Assembly, except as to two or three officers. 2 Constitutional Debates, 1238.

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Generally, then, the appointment to an office is an executive function. It must be conceded, however, that it is not every appointment to office which involves the exercise of executive functions, as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by the General Assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like. Such appointments by the several departments of the State government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch. But the appointment to an office like the one involved here, where it is in no manner connected with the discharge of legislative duties, we think involves the exercise of executive functions and falls within the prohibition of section 1, article 3 of the Constitution. It is believed that the Constitutions of a large majority of the States in the Union contain an express provision prohibiting the General Assembly from appointing officers not connected with their legislative duties. A like prohibition is contained in our Constitution, except in cases where it is expressly provided that they may appoint. As the Legislature of our State is prohibited from appointing to office except as in the Constitution expressly provided, it remains to inquire whether there is any express provision giving it the right to appoint the appellants to the office which they now claim. And in making this inquiry it is necessary to consider our Constitution as a whole. No lawyer who desired to ascertain the intent of the framers of that instrument would undertake to do so by considering it in detached portions. When considered and construed as a whole, it is impossible to avoid the conclusion that those who framed it intended to deprive the Legislature of all appointing power. Frequent reference is made to offices the appointment to which is vested in the General Assembly. Section 18, arti-

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cle 5, is as follows: "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is *vested in the General Assembly*; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of judge of any court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." Here is an express recognition of the fact that the General Assembly is vested with the power to appoint to some office, and from the language used, the strong inference is that it is a State office. But no power to make such appointment is conferred by the provisions of this section, and, if such power exists, we must look elsewhere to find it.

Section 1, article 15, is as follows: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

This provision is evidently to be construed in the light of the laws in force at the time of its adoption. We think it would be impossible to ascertain its meaning in any other way. Other sections of the Constitution make provision for appointments by the Governor and for certain appointments by the General Assembly, but there was still a large number of officers created by law for whose appointment no provision had been made. In view of this fact section 1, article 15, was inserted, providing that such officers should be appointed in such manner as then was, or as should thereafter be, prescribed by law. It is disclosed by an examination of the laws then in force, that the manner of appointing, or electing, State librarian, State printer, warden of the State prison at Jeffersonville, commissioners of the insane asylum, and, perhaps, some other officers, for whose appointment no provision is made in the Constitution, were elected or appointed by joint ballot of the two Houses of the General Assembly. This, at the time of the adoption of the Consti-

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tution, was the manner prescribed by law for their appointment. This section provides that they shall continue to be so appointed unless a different mode is prescribed by law.

This construction harmonizes and gives force to all the provisions of the Constitution, while to wholly deny the General Assembly the power to make appointments renders meaningless many words, phrases, and even whole sentences found in that instrument.

It is not to be supposed that a single word was inserted in the organic law of the State without the intention of conveying thereby some meaning. While it is true that this section does not purport, on its face, to grant to the General Assembly any special power of appointing to office, it does, we think, when construed in connection with the laws to which it refers, reserve to it the power to appoint such officers as it then had the right to appoint by the laws then in force, unless a different provision was made by the Constitution. But does it follow that because this section confers on the General Assembly that power, it also has the right to create new offices and fill them, or to fill offices then in existence, the right to fill which was not at that time vested in it by law?

Other provisions of the Constitution confer on the General Assembly the right to create new offices, but they are silent as to the manner in which they shall be filled. It is true, they provide that they shall be filled in the manner prescribed by law, as does the last clause of section 1, article 15. It is argued that because this latter clause, as well as other provisions of the Constitution, confers on the General Assembly the power to prescribe the manner of election or appointment, it may, by law, reserve the right of appointment to itself. It is obvious, however, that there is a broad distinction between providing the mode or manner of doing a thing and doing the thing itself.

In the case of the *State v. Kennon*, 7 Ohio St. 546, 560, BRINKERHOFF, J., in discussing this question, says: "To

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make good this claim, it must be made to appear that the power to direct the *manner*, the *mode*, the way in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical, or equivalent to each other, is too clear for argument, and almost too clear to admit of illustration. To prescribe the *manner* of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. And, under a Constitution in which the philosophical theory of a division of the powers of government into legislative, executive, and judicial, should be exactly carried out in detail, the power of prescribing the *manner* of making appointments to office would fall naturally and properly to the legislative department; while the power to make the appointments themselves would fall as naturally and properly to the executive department. This exact adherence to theory, however, is seldom if ever found in any frame of government; and we refer to the distinction simply by way of reply to the claim, on behalf of the defendants, in argument, that the power to prescribe the *manner* of appointments includes the power of appointment itself, and to show that they are acts and powers wholly different and distinct from each other."

SWAN, J., in the same case, used the following language: "Upon this question, it seems to me only necessary to refer to the plain words of the Constitution. It provides, in the first place, that 'the election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as may be directed by law.' Now, providing by law the manner in which an appointment shall be made, and the making of the appointment itself, are two different things: the first is pointing out the mode in which the thing shall be done, and the other is doing the thing itself; the one is legislative and directory, the other administrative."

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We think it plain that the power to provide by law the *manner or mode* of making an appointment does not include the power to make the appointment itself. As has been said, by section 1, article 15, the General Assembly has the right to appoint such officers as it had the right by the law in force at the time of its adoption to select, and by the terms of that section it also has the right to prescribe by law the manner in which officers for whose appointment no provision is made in the Constitution shall be appointed. What, then, is the limit of the legislative power to appoint to offices created by statute, or is there any limit to such power? If there is no limit, then the General Assembly may appoint all the officers created by statute, from the attorney general of the State down to the smallest township officer, for they are all the creatures of the statute. It may appoint the board of county commissioners, the township trustees, county superintendents, and even road supervisors. It may create offices without limit and fill them with its own appointees.

In the light of the contemporaneous history of the Constitution, we do not think it will be seriously contended that the framers of that instrument intended to confer upon, or leave with, the General Assembly any such power. Where, then, is the limit? Whatever the limit may be, it is clear to us that it has no power to fill, by appointment, a local office like the one now under consideration. As the right to prescribe by law the manner of appointing to a new office created by the Legislature does not carry with it the right to make such appointment, we know of no provision in the Constitution under which such right can reasonably be asserted. It is believed that this conclusion accords with the practical construction heretofore placed upon our Constitution.

The first General Assembly to meet after the adoption of the Constitution claimed and exercised the right to appoint the officers which they had the right to appoint under the law in force at the date of its adoption, and for the appoint-

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ment of which no provision had been made by the Constitution, while the other appointments have generally been conceded to the executive department of the State; but at no time in the history of the State has the General Assembly, until now, claimed or exercised the right to appoint local officers for a town or city.

In our opinion, so much of the act now under consideration as attempts to confer on the General Assembly the duty of appointing or electing to the office now claimed by the appellants, is in conflict with our Constitution, and is void. It seeks to confer on that body executive functions which it is prohibited from exercising.

This leads us to the consideration of the question as to whether the remaining portions of the act are constitutional. It is to be observed that the act takes away from cities having a population of fifty thousand inhabitants or more all control over the streets and alleys, lights and water supply, and transfers it to a board, in the selection of which the people of the city have practically no voice. It is claimed that inasmuch as it practically deprives the people of the power of local self-government, it is in conflict with our organic law, and is therefore void.

In passing upon this question it is necessary that we keep in mind the well established rules by which we are to determine the constitutionality or the unconstitutionality of a statute.

The power of the courts to declare a statute unconstitutional is a high one, and is very cautiously exercised, and is, in fact, never exercised in doubtful cases. *Robinson v. Schenck*, 102 Ind. 307. An act of the Legislature is not to be declared unconstitutional unless it is clearly, palpably and plainly in conflict with the Constitution. *Groesch v. State*, 42 Ind. 547.

Judge Cooley, in his able and valuable work on Constitutional Limitations (5th ed.), page 208, says: "It does not follow, however, that in every case the courts, before they

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can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it can not be necessary to prohibit its being done."

With these reasonable and well established rules constantly in view, we proceed to examine the question of the constitutionality of the act now before us. In doing so it must be obvious to every one that the Constitution must be considered in the light of the local and State governments existing at the time of its adoption. Considered in any other light, many expressions found therein would be without meaning. That the principles of local self-government constitute a prominent feature in both the Federal and State governments is a fact not to be denied. It is recognized in Indiana in the Constitution of 1816 and in the Constitution of 1851. It is truthfully said by the learned judge who delivered the majority opinion in the superior court, "that it existed before the creation of any of our Constitutions, National and State, and all of them must be deemed to have been framed in reference to it, whether expressly recognized in them or not; indeed, it is recognized as the chief bulwark for the protection of the liberties of the people against too great centralization of power, either in executive or legislative departments of the State."

It is, perhaps, true that the General Assembly may, at will, pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had previously been given, but we do not think that it can take away from the people of a town or city rights which they possessed as citizens of the State before their incorporation. The object of granting to the people of a city municipal powers is to give them additional

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rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. It may be true, that as to such matters as the State has a peculiar interest in, different from that relating to other communities, it may, by proper legislative action, take control of such interests; but as to such matters as are purely local, and concern only the people of that community, they have the right to control them, subject only to the general laws of the State, which affect all the people of the State alike. The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone is concerned, and in which the State has no special interest, more than it has in the health and prosperity of the people generally, and they are matters over which the people affected thereby have the exclusive control, and it can not, in our opinion, be taken away from them by the Legislature.

Municipal corporations are to be regarded in a two-fold character: the one public, as regards the State at large, in so far as they are its agents for government; the other private, in so far as they are to provide for the local necessities and conveniences for their own citizens; and as to the acquisitions they make in the latter capacity, as mere corporations, it is neither just nor is it within the power of the Legislature to take them away or to deprive the local community of the benefit of them. *People v. Hurlbut*, 24 Mich. 44. In the case above cited the learned judge who delivered the opinion said: "We must never forget, in studying its terms (the Constitution), that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not

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towns or counties or cities or villages, in the abstract—or municipalities which had lost all their old liberties by central usurpation—but American and Michigan municipalities of common law origin, and having no less than common law franchises. So far as any indication can be found, in the Constitution of 1850, that they were to be changed in any substantial way, the change indicated is in the direction of increased freedom of local action, and a decrease in the power of the State to interfere with local management.”

Again, in the same opinion, this language is used: “Incorporated cities and boroughs have always, both in England and in America, been self-governing communities within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more nor less than ‘investing the people of the place with the local government thereof.’ (Salk. 193.) In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience or by encroachment. In modern times cities have generally acted in ordinary matters by such a select body. * * * But whether acting directly or by their representatives, the corporation is, in law, the community, and its acts are their acts, and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation. This has been from time immemorial settled law. By articles 15 and 16 of the great charter, it was stipulated that the liberties and free customs of London and all other cities, boroughs, towns, and ports should be preserved. Those liberties were all connected with and dependent upon the right to choose their own officers and regulate their own local concerns. * * * Our Constitution can not be understood or carried out at all, except on the

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theory of local self-government ; and the intention to preserve it is quite apparent. In every case where provision is made by the Constitution itself for local officers, they are selected by local action. All counties, towns, and school districts are made to depend upon it."

So the intention to preserve local self-government is apparent throughout the entire scope of our own Constitution. By section 2, article 6, county officers are to be elected by the people at the general elections. By section 3, article 6, such other county and township officers as may be necessary are to be elected or appointed in such manner as may be prescribed by law ; and it is expressly provided, in clause 4 of the schedule to the Constitution, that "All acts of incorporation for municipal purposes shall continue in force under this Constitution until such time as the General Assembly shall, in its discretion, modify or repeal the same."

It is, therefore, perfectly apparent from the Constitution itself that it was framed with reference to then existing local governments of counties, towns, townships and cities. Did the people, then, in the adoption of the Constitution, surrender the right to local self-government which they at that time possessed ?

Judge COOLEY, in the case above cited, said : " The State may mould local institutions according to its views of policy or expediency ; but local government is matter of absolute right ; and the State can not take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the State not only shaped its government, but at discretion sent in its agents to administer it ; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all." Two years later, in a reconsideration of the same question, in *Board, etc.*, v. *Common Council of Detroit*, 28 Mich. 228, he said : " Conceding, as we already have, the general right of the Legislature to prescribe the duties and authority of municipal of-

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ficers, it would nevertheless be easy to demonstrate that unless there are some limitations upon that right, the constitutional guaranty of local self-government would be without meaning or value. Many things might be suggested so utterly destructive of the local municipal institutions, which have been handed down to us, that the most strenuous advocate of the legislative authority would admit without hesitation that they were forbidden by the Constitution. If we may suppose, for an illustration, that the Legislature shall provide that in Detroit a single person may be chosen in whom may be vested the whole legislative authority of the city, and all other authority pertaining to local government of every description and nature, not expressly by the Constitution confided to officers specified, it would require unusual boldness in any one who should undertake to defend such a local dictatorship as something within the competency of legislation under a Constitution avowedly framed to guard, protect and defend the local powers and local liberties."

In this case the Legislature has undertaken to place in the hands of three men the exclusive control of all the streets, alleys, lanes, thoroughfares, bridges and culverts in the city of Indianapolis, without the consent of those to be affected thereby, with full power to improve, alter or change the same in any manner they may choose, with the exclusive power to employ all the assistance they may desire, including legal counsel, and fix their salaries and compensation in such sums as they, in their unrestrained judgment, may think proper, without any accountability to any one. Not only that, but these three men are given absolute and exclusive control over the construction of all sewers, the water supply and supply of lights, with no voice in the matter left to the people of the city. If the Legislature may put these matters in the hands of three men, why not in the hands of one man? And if they may transfer these matters, why may they not transfer others? In other words, the effort is by this act to take from the city all control over the improve-

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ments of the city, without the consent of her people, and place it in the hands of the agents of the State chosen by the Legislature, and charge the people of the city with the whole expense.

We do not think that the people have conferred upon the Legislature any such power. It is subversive of all local self-government, a right that the people did not surrender when they adopted the Constitution. They still retained, after the adoption of that instrument, the right to select their own local officers, and every effort to deprive them of such right must be held to be beyond the power of the Legislature. In our opinion the entire act attempting to create a board of public works and affairs for cities having a population of fifty thousand or more, is in conflict with the Constitution, and is void.

In coming to this conclusion we have not been unmindful of the fact that authorities are to be found which would seem to lead to a different conclusion, but the authorities upon which we rely seem to be based upon the better reason. In support of the conclusion reached in this case, we cite: *People v. Albertson*, 55 N. Y. 50; *People v. Hurlbut*, 24 Mich. 44; *People v. Common Council of Detroit*, 28 Mich. 228; *People v. Lynch*, 51 Cal. 15.

We are asked to decide other questions in the case involving the validity of the act in question, but as we have reached the conclusion that it is void, as being in conflict with the Constitution, we do not deem it necessary to extend this opinion.

We find no error in the record for which the judgment of the superior court should be reversed.

Judgment affirmed.

Filed April 24, 1889.

SEPARATE OPINION.

ELLIOTT, C. J.—The importance of the questions involved must serve as my apology for outlining my views, for they are

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not very different from those embodied in the principal opinion.

The question in this case, so far as it directly involves the appointing power of the General Assembly, is, as it seems to me, this: Has that body the power to appoint local officers, county, township, town or city? Those who affirm that it has that power, necessarily affirm that it may take it from the people of the locality. This I deny.

By the express declaration of our Bill of Rights, all power is inherent in the people, but this is nothing more than the expression of a principle that is older than the Constitution, and exists by its own innate vitality and vigor. It needed no constitutional declaration to invest the people with power, but it does require a constitutional provision to take it from them in whole or in part. This inherent power includes the right of the people to choose their rulers. An essential part of this inherent power, as it has been asserted and exercised for many years, is the right of the electors of a locality to choose their own immediate officers. In my judgment our Constitution does not take away this right, but leaves it in the people, undiminished and undisturbed. There it has resided for ages, and there it is to reside until the people shall, in due course, change their organic law. The right existed in the free cities which formed the famous Hanseatic league, and the sturdy maintenance of this right did as much as any other one thing to arouse and keep alive the spirit of liberty throughout Europe. The right is carefully protected in the great charter of English liberty, and has ever been one of the cherished rights of freemen. It found in the towns and villages and cities of New England even a stronger and broader expression than it had in the mother country. 2 Bryce Am. Com. 567. By naming cities municipal corporations the right of local self-government was indicated as existing in their inhabitants. We get our term "municipal corporations," from the words "*municeps*," or "*municipitis*,"

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meaning, I may say, without professing to be strictly accurate, "the right of a freeman"—the right to vote. In a recent work the meaning of the word "municipal" is thus illustrated: "Pertaining to local self-government." 5 Encyclopædic Dict. 131. Our Constitution recognizes and preserves this right, and the thought of destroying it never entered the minds of the men who framed that instrument. If the proposition to impair or destroy it had been made in the convention, I am sure, judging from the tone of the debates and the course of the proceedings, that it would have been sternly and effectually condemned. Before, and since, the adoption of our present Constitution, the uniform practice has been for the people to choose their local officers, and this practice is in harmony with the spirit and purpose of our system of government. By this long continued exposition a force and effect have been given to the Constitution that no department of the government is at liberty to disregard. The system of local self-government which prevails in America has commanded the admiration of such great thinkers as De Tocqueville, Lieber and others, and it has been said that it is one of the "greatest safeguards of civil liberty." Professor Lieber says: "Self-government, general as well as local, is indispensable to our liberty." Thomas Jefferson said: "These wards, called townships in New England, are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation. As Cato, then, concluded every speech with the words '*Carthago delenda est*,' so do I every opinion, Divide the county into wards." These words of wisdom influenced our people and the framers of our organic law, and they should so influence our courts that they may not depart from the fundamental principle of self-government. The right of local self-government is, indeed, one of the strongest and most efficient checks in our system of checks and bal-

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ances which John Adams and the other great statesmen of his time so earnestly labored to perfect and establish.

If the power to appoint to office were inherently or intrinsically a legislative one, then there would be much more strength in the contention that the General Assembly may appoint local officers, but it is not an intrinsic or inherent legislative power except in so far as it is as an incidental power, essential to the existence of the legislative branch as an independent department of the government. There are provisions in the Constitution which do confer upon the General Assembly a limited appointing power. Some appointing power that instrument does, as I believe, vest in the General Assembly, and a practical exposition, to which it is our duty to yield, has given a construction to the provision vesting that power, and to some extent has measured it. The Legislature has for many years assumed the power in a class of cases either by directly exercising it or by authorizing the executive to exercise it, and this assumption of power has been acquiesced in by all the departments of the government and by the people. The existence of a limited appointing power in the General Assembly has been, in some few instances, recognized by the judiciary, but there is, as I think, no direct adjudication upon the extent of the power possessed by that body. In my judgment the appointing power which the General Assembly possesses—aside from that incidental right of appointment resident in every independent branch of the government—is limited and confined to a class of offices, and to this class local municipal offices, whether county, township or city, do not belong.

It was said in argument that our English ancestors fought to abridge the executive power and to extend that of parliament. This is true of the earlier years of British history, but it is equally true that, as the years passed, the legislative power of England so dominated and overshadowed the executive as to make parliament omnipotent. Judge Wilson, of Pennsylvania, one of the very ablest of the members of

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the great body which framed the Federal Constitution, taking as his text the saying of one of England's greatest statesmen, that "England can never be ruined but by a parliament," demonstrates the danger of allowing to the legislative department any other than strictly legislative power. The judges of the Supreme Court of the United States joined in a letter to President Washington upon the general subject, insisting upon a scrupulous and undeviating maintenance of the principle of the separation of the departments. Jefferson, Madison and Hamilton wrote earnestly upon the question, and all of these great men, as, indeed, many others, united in earnestly protesting against tolerating the claim of the legislative department to exercise any other than legislative power. Modern writers have not been less earnest in their protests and warnings against the encroachment of the legislative department. A change has taken place within the last century and a half, and the fear of the great men of our country has been of legislative encroachment, not of executive usurpation. Over and over again have the jurists, statesmen and publicists warned the people that the legislative department is the overmastering one, and that the tendency is almost irresistibly in the direction of a despotic centralization of power in that department. We must presume that the framers of our Constitution knew the history of the times, perceived the danger of centralized power, and gave heed to the utterances of the great men who moulded public opinion and gave tone to public thought, and, acting upon this presumption, we can not do otherwise than conclude that the members of our convention did not intend to augment legislative power and bring about that condition which the great thinkers earnestly affirmed was so full of peril. In Cromwell's time the fear was of executive usurpation; in 1850 the fear was—as the writers all declare it still is—of legislative encroachment. The historic argument is, therefore, against, and not in favor of the legislative assertion of the appointing power.

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The right to choose officers is primarily and inherently in the people. Primarily it is neither an executive nor a legislative function. Except as expressly or impliedly delegated to the executive or the legislative department, it resides entirely in the electors of the State. Silence on the subject takes no part of the power from the people, and vests none in their representatives. *Johns v. State*, 3 Or. 533; *People v. Bull*, 46 N. Y. 57; *Speed v. Crawford*, 3 Metcf. (Ky.) 207.

It is the duty of all the departments of the government to make provision, or to aid in making provision, to secure, as far as possible, this right to the people in its integrity. The predominant purpose of our present Constitution was to make few appointive offices and many elective ones. This purpose is manifested in the body of the instrument, is revealed in the debates and proceedings, and is strikingly shown in the provisions of the schedule which vacated all offices which the Constitution of 1816 gave the Legislature power to fill by appointment.

That the whole purely legislative power of the State is vested in the General Assembly, is true, but that the Constitution vests in that body, except in a few enumerated instances, any other than legislative powers, is not. Article 3 enumerates and distributes the powers of government, and prohibits their centralization in any one department. Articles 5, 6 and 7 define the powers of the executive, administrative and judicial departments, while article 4 vests and defines the legislative power. The first section of that article ordains that "The legislative authority of the State shall be vested in the General Assembly," and section 16 declares that "Each House shall have all powers necessary for a branch of the legislative department of a free and independent State." These provisions limit the power of the General Assembly to one of the three independent departments—the legislative—for it is a principle of logic and of law that the express mention of one thing implies the ex-

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clusion of all others. *In re Courts of Lancaster*, 4 Clark (Pa.), 501; *King v. Hopkins*, 57 N. H. 334; *Turner v. Althaus*, 6 Neb. 54. The limitation in section 16 is, indeed, a two-fold one. That section not only limits the power to the legislative department, but it also limits it to the legislative department of a free and independent State. *In re Courts of Lancaster, supra.* The power of the General Assembly is, therefore, the power of the Legislature of a free State, and, since the time of Montesquieu—indeed, for centuries before he wrote, for he did no more than develop a well known principle—it has been affirmed by philosophers, statesmen and jurists that no free State can exist if different governmental powers are concentrated in one body. All agree that the concentration of power inevitably results in despotism. *Merrill v. Sherburne*, 1 N. H. 199 (201); *Hawkins v. Governor*, 1 Ark. 570 (590, 592); *People v. Albertson*, 55 N. Y. 50 (55); Jefferson's letter to Kercheval, July 12th, 1816; 5 Elliott Const. Debates, 327, 337; Pomeroy Const. Law, sections 169, 643; Federalist Letters, 47, 48; 1 Von Holst Const. History, 29; 1 Curtis History of Const. 119; Wilson Cong. Government, 12, 36; Lieber Civil Liberty, 154.

Although the provisions of the Constitution delegating legislative power to the General Assembly are, except where other than legislative powers are specifically conferred upon it, in themselves sufficient to confine that body to a single department of the government, they are not to be considered without reference to the provisions separating the departments and distributing the powers of government, but are to be taken in connection with them, and when they are thus considered it is clear that, as Mr. Bryce says, "a Legislature is a Legislature and nothing more." 1 Am. Com. 429. The Legislature was likened in argument to the sea, and the figure may not be altogether inapt, but it is incomplete, for it omits the important element that the legislative sea is not a shoreless one. "The Constitution is the shore," it has

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been said, "against which the waves dash, but over which they can not leap."

It is no doubt true that the Legislature does, as I have said, possess, as an incidental right, the power of appointment, for this it would have without any specific grant, since this limited power must exist in every department or it can not be independent. The Legislature does not, in my opinion, either by express grant or by implication, possess any general and unrestricted appointing power. It is generally agreed that the power of appointment is intrinsically an executive power; it is, at all events, not properly a law-making power. It is one thing to make a place for a man by enacting a law, and another thing to put him in that place. The one thing is purely and intrinsically legislative; the other is not. *State v. Barbour*, 53 Conn. 76; *Taylor v. Com.*, 3 J. J. Marsh. 401; *Perkins v. United States*, 20 Ct. of Claims R. 438; *United States v. Perkins*, 116 U. S. 483; *Achley's Case*, 4 Abbott Pr. R. 35; *People v. McKee*, 68 N. C. 429; *Federalist Letters*, 47, 48; *Broom Const. Law*, 524.

One who reads the debates and proceedings of the convention which framed our Constitution can not fail to perceive that a great purpose, if not the leading purpose, of the convention was to abridge the appointing power of the General Assembly. This purpose is apparent in all the important measures and speeches, and that the members of the convention believed that they had accomplished it, is evident. One of its distinguished members, Hon. William S. Holman, said: "It will be recollected that we do not intend to confer upon the Legislature the power of appointing. There may possibly be two or three offices the appointment to which will be vested in the Legislature, but the great body of them are to be filled by election, by the people." 2 Const. Debates 1238. This was said after the convention had been in session for many days, and after the subject had been discussed in various forms, so that it was not the statement of one not well informed. Nor was the statement denied; on the con-

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trary, it was acquiesced in by all, even by those who were opposed to Mr. Holman on the particular phase of the question then under immediate discussion. I have given such study to the public discussions that led to the call of our convention of 1850, as the pressure of duty would permit, and find that one of the reforms most earnestly called for was a limitation upon the power of the Legislature to appoint to office. It is always proper to look to the history of the times and to the debates of the convention to determine the purpose of the framers of the Constitution, and, looking to these things, it is quite clear to my mind that the framers of the Constitution did not intend to confer any general appointing power upon the Legislature, but that they did mean to abridge rather than extend that power. The chief purpose was to remove the restrictions upon the power of the people, and to leave in them the right of choosing their officers.

Assuming that the General Assembly has some appointing power, still it can not, in any event, be granted that it extends—if, indeed, it extends so far—to any other officers than officers of the State, in the broadest sense of the term. An officer of a municipal corporation is not a State officer, and, therefore, as has been expressly adjudged, the same person may, at the same time, hold a municipal office and a county or State office without violating the provision of the Constitution which forbids one person from holding two lucrative offices. *State, ex rel., v. Kirk*, 44 Ind. 401; *Mohan v. Jackson*, 52 Ind. 599.

The General Assembly represents the whole State. This is so in legal contemplation and should be so in fact. One of the evils of legislation which writers have often censured is that of legislating for localities at the expense of the general weal, and it was to check this evil that our Constitution forbade local legislation. As the General Assembly represents the State at large, and as municipal officers are not State officers, the General Assembly can have no power to appoint them. Another element deserves consideration here,

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and that is this: The municipal corporation as a local government is not represented by the General Assembly, and to permit that body to designate the officers who shall govern local affairs would be to tax the citizens of the corporation without representation. This, it is hardly necessary to say, would violate a principle which lies at the foundation of free government. It is no answer to say, as is sometimes said, that the municipal corporation has representatives in the General Assembly, for, as a municipal corporation, it is not, as to its local affairs, represented by that body, for that body represents the State and legislates in State affairs. Incidentally it legislates, in a general way, for localities, but only because the welfare of the whole State is thereby promoted. As a part of the constituency of the Legislature the citizens of a town or city are represented, but they are represented in the capacity of citizens of the State and not as the inhabitants of a municipal corporation. A town or city has but little power in any General Assembly, and to permit that body to control their local affairs would put them in charge of men from distant parts of the State who could have little, if any, knowledge of local affairs and no direct interest in them, so that the inhabitants of such a town or city would be governed by persons who did not and who could not, in the just sense of the term, represent them, and this result our Constitution will not tolerate.

I do not deny that the Legislature has the power to change the form and mode in which municipal corporations shall be governed; on the contrary, I affirm that without the consent of the inhabitants the form of the corporate government may at any time be altered, but I do deny that the Legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. By immediate local officers, I mean such as are charged with the control of purely local concerns, as the streets, the fire apparatus, and the like matters. In the class of local officers I do not include the peace-keeping officers,

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or the constabulary, for such officers are, in reality, officers of the State, as it is the duty of the State to provide for the personal safety of its citizens on the thronged streets of a great city as well as on the secluded rural highways. What I affirm, in short, is this: That because an elector lives in a city he can not have the right to vote upon purely local affairs taken from him by any statute.

The decisions which declare that the State may appoint peace officers in cities can be sustained only upon the ground that such officers are State officers and not local officers. The principle is one not to be extended, but to be limited. That venerable and able judge, CAMPBELL, of Michigan, who has so long occupied a high position among the judges of this country, so clearly expresses what I conceive to be the true rule that I can not forbear copying his language: "Up to this time," he says, "and ever since elections were first held in Michigan, they have not only been localized in some municipal division, but regarded as municipal action and supervised and managed by municipal officers either directly elected or else appointed by those who have been elected. Such a board as this, which is in no sense a mere agency of the city, is foreign to our system. If it can be created in a city, it may just as well be created in a county, or for the State. When the election ceases to be a municipal procedure, the whole foundation of municipal government drops out. And a municipality which is not managed by its own officers is not such a one as our Constitution recognizes." *Attorney General v. Detroit Common Council*, 58 Mich. 213. In the same case, MORSE, C. J., said: "I fully agree in the views so ably expressed by Justice CAMPBELL in the leading opinion filed in this cause. The nearer the officers are to the people over whom they have control, the more easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our State government presupposes that the people of each locality, each mu-

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nicipal district or political unit, are intelligent and virtuous enough to be fully capable of self-government."

Continued and uniform exposition, broken by this act for the first time in the whole history of our State, supports the views of the majority of the court upon the question of the right of the citizens of a political corporation, such as a county, township or city, to choose their own local officers. The essential and abiding principle of local self-government supports it. The rule that the people, whose property is liable for municipal debts, should choose those to whom they will entrust the management of their local affairs yields it support. The rule that the Constitution recognizes the principle that the people of a locality can govern themselves honestly and intelligently, without the direct guardianship of persons representing the State at large, gives it support of no uncertain character. The broad principle that laws shall be uniform throughout the State, and that the electors of some localities shall not be disfranchised while others are left with the undiminished rights of freemen, supports it.

Discrimination in legislation is never just, unless there is a valid and substantial reason for the discrimination, and there can be no reason for disfranchising voters in a city that has thirty thousand inhabitants that does not exist for disfranchising them in a city of twenty thousand, or one thousand, inhabitants. It was to prevent such discrimination that our Constitution forbids class legislation of every kind.

Filed April 24, 1889.

DISSENTING OPINION.

MITCHELL, J.—The important question for consideration arises out of the proposition that local self-government, as applied to the regulation of municipal affairs, under the Constitution of the State of Indiana, is an inherent right of the people, "older than any American Constitution," not conferred upon them by the Legislature; that it is an "insep-

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arable incident " to republican government, and entirely beyond legislative interference.

It is affirmed that the enactments involved in the present case, and in some other cases before the court, while not in contravention of any express constitutional provision, violate these fundamental maxims of government, and that it is hence the duty of the court to declare them void and arrest their execution. This is the breadth and proportion of the question.

The rule under which the General Assembly and the courts of this State have heretofore proceeded in the enactment and interpretation of statutes is, that the authority of the Legislature is supreme, and subject to no limitations except such as are imposed by the Constitution of the State, the Constitution of the United States, and the laws and treaties made under it.

This rule of interpretation is firmly imbedded in the jurisprudence of all the States, and has become part of the American system. Often as the effort has been made to erect some other standard, the courts have declared that, until some express provision of the Constitution could be pointed out which the Legislature, in the enactment of a law, had disregarded, judicial interference could not be successfully invoked. *Beauchamp v. State*, 6 Blackf. 299; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185; *Campbell v. Dwiggin*, 83 Ind. 473; *Hedderich v. State*, 101 Ind. 564.

Public statutes are not to be regarded as common enemies, whose speedy extermination is specially committed to the courts. The power to declare a statute void is one of the highest possessed by any judicial tribunal in the world, and everywhere the authorities say this power is only to be exercised with the utmost care, and after all doubts as to the constitutionality of the law have been dispersed. *Robinson v. Schenck*, 102 Ind. 307.

The Constitution has erected no standard by which to determine what constitutes local self-government, or what are natural and inherent rights, as those terms relate to mu-

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municipal government. These are questions of political, and, therefore, of exclusively legislative concern, with which other departments can not interfere without invading the legislative domain.

Disputes over theories of local self-government began with the organization of civil society, and they will doubtless continue until human government ends. Publicists and doctrinaires, whose writings are appealed to, are not agreed concerning the natural and inherent rights of men, as related to government, nor is it best they should agree. Our State Constitution was adopted by the people, as a well matured scheme of practical, progressive government, and its written limitations may be readily comprehended by intelligent men who are called to engage in framing legislation adapted to the growing needs of every portion of the State. Progress is at an end, however, if legislation must wait until the courts set bounds to the shoreless sea of local self-government, or until the judiciary ascertains and declares what are the "inseparable incidents" to written Constitutions under our republican system.

The debate on those subjects must be left free, open and unfettered, and it must be left, as all the authorities say, exclusively with the people and their chosen representatives. The judiciary can not debate. Courts give judgment, which means that discussion is ended. Hence the rule that the authority of the Legislature in the enactment of laws is supreme, and subject to no restrictions, save only such as are found written in the organic law. Hence the further rule that courts can not interfere to set aside an act of the Legislature, on the ground that it is opposed to a spirit that is supposed to pervade or underlie the Constitution, or that it contravenes the natural rights of society or the general principles of local self-government. Although the Constitution is to be regarded as having been framed and adopted with all these principles in view, until they have been declared in

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terms in that instrument they do not become subjects for judicial interpretation.

Speaking of limitations upon legislative authority, Judge Cooley, the value of whose opinions will not be questioned, has well said: "Some of these are prescribed by Constitutions, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience. * * * Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley Const. Lim. (5th ed.) 153; *Walker v. City of Cincinnati*, 21 Ohio St. 14; *State v. McCann*, 21 Ohio St. 198; *Adams v. Howe*, 14 Mass. 340 (7 Am. Dec. 216). Very many judicial decisions support this view, and there are none to the contrary.

The same learned author lays it down as an established rule, that courts can not declare a statute unconstitutional because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that the legislation is inhibited by the Constitution, and he asserts that, while some expressions may be found in the opinions of judges which have been understood to intimate a different doctrine, these expressions were used merely by way of illustration or argument, rather than as laying down a rule by which courts could apply limitations to legislative action. Cooley Const. Lim. 197-201. These principles have found expression in the decisions of every court, and in every textbook where the subject has been considered. Thus, in *Beebe v. State*, 6 Ind. 501, 528, this court, speaking by STUART, J., said: "Such is the imperfection of the best human institutions, that mould them as we may, a large discretion must at last be reposed somewhere. The best, and in many cases the only security, is in the wisdom and integrity of public

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servants, and their identity with the people. Government can not be administered without committing powers in trust and confidence." Said ROGERS, J., in *Commonwealth v. McCloskey*, 2 Rawle, 369: "If the Legislature should pass a law in plain, unequivocal, and explicit terms, within the general scope of their constitutional power, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice. * * * This would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society."

The legislature must be the sole judge of whether or not an act is in violation of the principles of local self-government, unless those principles are defined in terms in the Constitution, and it must be assumed, in the absence of constitutional definition, that these principles are as well understood by the Legislature as by the courts. If an act is in violation of the Constitution, the courts should, when clearly convinced that it is so, unhesitatingly declare it void, but as was said in *Sharpless v. Mayor, etc.*, 21 Pa. St. 147: "We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect." This the court declined to do, and declared that until it appeared that the act was in violation of some provision of the Constitution, it was not a subject for judicial cognizance. This must, in the nature of the case, be the only true and safe rule by which courts can be guided. If, over and beyond the express limitations imposed by the Constitution, the theories of local self-government, as the courts may interpret them, are to operate as limitations upon the Legislature, confusion and uncertainty must inevitably result. Nor is the problem solved by assuming that the science of municipal government had attained such a degree of perfection when the Constitution was adopted as that all inquiry concerning the principles of local

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self-government must be referred to the methods which prevailed at that period. As was said in *Ohio v. Covington*, 29 Ohio St. 102: "By such interpretation of the Constitution, the body of the laws in force at the time of its adoption would have become as permanent and unchangeable as the Constitution itself."

The inquiry may be pertinently made, how are the boards of health, police, fire and other departments of municipal government, in the cities affected by the legislation here denounced, to be organized or constituted in the future? Are these cities to be turned back, by the judgment of the court, forty years to the methods that prevailed at that time? Who shall say how these indispensable departments of city government are to be organized and their members chosen, so as to conform to the principles of local self-government. Must the cities, the courts or the Legislature determine?

It is impossible to discuss the subject of the power of the Legislature over municipal corporations without repeating much that has already been said by courts. The agglomeration of population into great cities, and the commercial and manufacturing interests that ensue, have produced the necessity for legislation such as that here involved in almost every State in the Union. The validity of such legislation has often been questioned before; it is not a subject new to the courts of the country, and it is believed that an unbroken line of decisions can be presented which uniformly sustain the formation of boards for the control of the local affairs of cities which affect the health, safety and convenience of persons, and the protection of life and property within the municipalities. The decisions which are relied on as holding a contrary view, were, it is submitted, in every instance controlled by express constitutional provisions, and present no exception to the current of authorities, which is overwhelming and without conflict, as can readily be shown, in support of the view here taken.

Municipal corporations are bodies politic and corporate,

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created by the Legislature as governmental agencies of the State, and they can only exercise such power as they derive from the source of their creation. Such powers as they exercise are at all times subject to legislative control, and in the absence of constitutional prohibition their powers may be enlarged or diminished, or withdrawn altogether, and their property devoted to other uses, as the Legislature may determine. *Rogers v. Burlington*, 3 Wall. 654; *Commissioners v. Lucas*, 93 U. S. 108; *Hamlin v. Meadville*, 6 Neb. 227; *Touchard v. Touchard*, 5 Cal. 306; *Mather v. City of Ottawa*, 114 Ill. 659.

The relations which municipal authorities sustain to the State are definitely fixed and were accurately expressed at a very early period in the history of this State.

In *Sloan v. State*, 8 Blackf. 361 (364), this court declared that "Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the State, but being wholly political exist only during the will of the General Legislature, otherwise there would be numberless petty governments existing within the State and forming a part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the Legislature, either by a general law operating upon the whole State, or by a special act altering the powers of the corporation."

This was the law as settled by the judicial department of the government when the present Constitution was adopted, and it must be presumed that if it had been deemed wise to impose restrictions on the Legislature, so as to secure municipal corporations against legislative interference, it would have been done by some direct method. Judge Cooley expresses the controlling idea when he says: "It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own

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administrative and police officers, and establish for themselves police regulations; but this maxim is subject to such exceptions as the legislative power of the State shall see fit to make; and when made, it must be presumed that the public interest, convenience, and protection are subserved thereby. The State may interfere to establish new regulations against the will of the local constituency." The conclusion laid down by this eminent judge is, that the maxims which have prevailed in the government, address themselves to the wisdom of the Legislature, and that their supposed violation by that body affords no warrant for judicial interference. Cooley Const. Lim. (5th ed.) 203, 204, 205.

The Legislature represents the public at large, and has complete and paramount authority over all the public highways and over all property devoted to public uses in the State. Streets, sewers and public drains exist only by authority of the State and in pursuance of public law. They are provided for the use of the public, and can only be compulsorily opened or improved by the power of the State. They are as much under State regulation as are rivers, railroads, canals or other public roads laid out or improved by the authority of the State. *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *Stormfeltz v. Manor T. P. Co.*, 13 Pa. St. 555; *Com. v. Plaisted*, 2 Lawyers' Rep. Ann. 142, and note.

The error which lies at the root of the argument by which the unconstitutionality of the acts here in question is attempted to be maintained, springs out of the fallacious assumption that the people of a city or town have any interest or inherent right whatever to municipal government, while every atom and vestige of right in those respects, under our system, are such, and only such, as the Legislature confers. Upon this baseless assumption, which obliterates and confounds all distinctions between municipal regulation, a creature of legislation, and county and township government which existed before Legislatures were, and which is, and always was, common to every community in the State, the

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whole fabric of argument adverse to the constitutionality of these acts is builded.

It is common learning, said Mr. Justice FIELD, in *Meriwether v. Garrett*, 102 U. S. 472, "found in all adjudications on the subject of municipal bodies, and repeated by text-writers," that "municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislatures may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure." In the case cited it was held that the power delegated to a city by the State might be withdrawn, and that when withdrawn, the public buildings, streets, squares, parks, fire engines, and all other property held by the city for public uses, passed under the immediate control of the State. The same high tribunal, speaking of the relations which municipal corporations sustained to the States, said, in *United States v. Railroad Co.*, 17 Wall. 322, 329: "It is one of its creatures, made for a specific purpose. * * * The State may withdraw these local powers of government at pleasure, and may, through its Legislature or the appointed channels, govern the local territory as it governs the State at large." See, also, *Mobile v. Watson*, 116 U. S. 289. In *Philadelphia v. Fox*, 64 Pa. St. 169, a case altogether parallel in principle with the present, after declaring that a city was merely an agency having no vested rights in the powers conferred upon it, and, therefore, fully subject to the control of the Legislature, SHARSWOOD, J., said that the sovereign might continue the corporate existence of the city, "and yet assume or resume the appointment of all its officers and agents into its own hands; for the power which can create and destroy can modify and change." "No one," continued the learned judge, "I think can doubt that it was entirely competent for that authority to vest the entire management and control of all municipal affairs in just such a body as that constituted by this act. If they could do the greater, they can do the less." See, also, *People v. Flagg*,

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46 N. Y. 401. In *People v. Mahaney*, 13 Mich. 481, wherein the power of the Legislature to create a police board, to be filled by appointment by the Governor, was sustained, it was declared by COOLEY, J., that legislation in violation of sound political principles, but which does not infringe the Constitution, can not be declared void.

In *People v. Draper*, 15 N. Y. 532, this whole subject received most careful consideration in construing a provision of the Constitution of the State of New York, which declared that "All officers whose offices may hereafter be created by law shall be elected by the people or appointed as the Legislature may direct." It was held that the Legislature was at liberty to provide for the election or appointment, in any manner it deemed suitable, of all officers, local or general, whose offices were created by law, the mode of whose election or appointment was not prescribed by the Constitution. In upholding an act of the Legislature establishing a metropolitan board of police in certain counties, embracing the cities of New York and Brooklyn, Chief Justice DENIO said: "As a political society, the State has an interest in the repression of disorder, and the maintenance of peace and security in every locality within its limits. * * It is within the discretion of the Legislature to apply such legislation as, in its judgment, the exigency of the case may require; and it is the sole judge of the existence of such causes. It has been said that a tendency may be discovered in the Constitution, toward local administration. * * This I believe to be true. * * * It may be the duty of the Legislature to follow out or advance such a line of policy, but the business of the courts is with the text of the fundamental law as they find it. They have no political maxims and no line of policy to further or to advance. Their duty is the humble one of construing the Constitution by the language it contains." See, also, *People v. Shepard*, 36 N. Y. 285.

It is sufficient to say in respect to the case of *People v. Albertson*, 55 N. Y. 50, which is claimed as lending support to

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a conclusion adverse to the constitutionality of the legislation here involved, that the decision of the case rests explicitly on the construction of section 2 of article 10 of the Constitution of New York, which declares that "All city, town, and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns or villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose."

A provision in the Constitution of the State of Michigan, which controlled the judgment of the court in *People v. Hurlbut*, 24 Mich. 44, the case chiefly relied upon to support the conclusion that the acts here in question are invalid, while not strictly identical in phraseology with that above set out, was construed to be identical in meaning with it. In these cases, in which it appears that local self-government was expressly guaranteed to municipal corporations in the organic law of the State, occur the forcible arguments and apt illustrations upon which the judgments of the courts rest. Accordingly, Judge COOLEY could well declare, as he did: "It is a fundamental principle in this State, recognized and perpetuated by express provisions of the Constitution, that the people of every hamlet, town, and city of the State, are entitled to the benefits of local self-government." *People v. Common Council of Detroit*, 28 Mich. 228.

That eminent jurist was not chasing the shadowy phantom of a "latent spirit," or of the "inalienable right of local self-government." He rested his judgment, where all courts have rested theirs, on the solid rock of an express provision of the Constitution he was expounding, in the light of the great principles to which he referred by way of illustration and argument.

No such declaration can be made with respect to the Constitution of Indiana, without first interpolating something into it which those who framed it omitted.

A board of health and a board of police commissioners for

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the city of Cincinnati were created by the Legislature of the State of Ohio in 1876. The members thereof were appointed by the Governor, in pursuance of authority conferred in the law. It was contended, in a case involving the constitutionality of the act, that because the officers composing similar boards were elective, by the electors of the several cities in the State of Ohio, at the time of the adoption of the Constitution, the act authorizing the Governor to appoint was in violation of the principles of local self-government. On the subject of the power of the Legislature to pass such a law the court says: "Rules and regulations for local municipal government of cities and villages are subjects of and are as clearly within the scope of legislation as are those which concern the State at large. Cities and villages are agencies of the State government. Their organization and government are under the control of the State, and every law which affects them must emanate from the General Assembly, where the legislative power of the State is vested." *Ohio v. Covington*, 29 Ohio St. 102. *Diamond v. Cain*, 21 La. Ann. 309; *Police Commissioners v. City of Louisville*, 3 Bush, 597; *State v. St. Louis County Court*, 34 Mo. 546.

The Supreme Court of the State of Kansas, speaking of the constitutionality of an act establishing a board of metropolitan police, used the following language: "In effect, it is said to be opposed to the fundamental theory of self-government, and denies to the people of the district the right to select their own officers from among their own number. Whatever may be said regarding the policy of placing the police administration of cities in a board of police commissioners who are chosen by State officers rather than through the electors of the cities, there can be no doubt that the Legislature has the power to do so." *State v. Hunter*, 38 Kan. 578. In like manner, the supreme judicial court of Massachusetts, in vindicating the constitutionality of a statute of that State from all the objections urged against the one here involved, said: "We find no provision of the Con-

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stitution with which it conflicts, and we can not declare an act of the Legislature invalid because it abridges the exercise of the privileges of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution.” *Commonwealth v. Plaisted*, 19 N. E. Rep. 224. An act creating a board of fire and police commissioners was created by the Legislature of the State of Nebraska. The Governor was requested to appoint the members of the board from different political parties, as was the fact in most of the cases already cited. Remarking upon the contention that the act was opposed to the principles of local self-government, the court said: “It is, no doubt, the general spirit of our Constitution and institutions, and in accord with the habits and traditions of our people, that the inhabitants of every subdivision of the State shall have an equal share and responsibility in public affairs, so far as the same shall have been found conducive to the public safety, the preservation of the public peace, and the conservation of the public morals, and in every case of doubt in construing a statute, where such construction might turn upon the recognition and fostering of such spirit, no court would be blind to its duty in that behalf. And yet it is the boast of the American people in every State that they live under a written Constitution and do not look for a guaranty of their rights or liberty to any intangible code of traditions, or the opinions or constructions of any man or set of men.” *State v. Seavey*, 22 Neb. 454 (467).

In *Mayor, etc., v. State*, 15 Md. 376, after an elaborate and most learned opinion, the court gave judgment establishing the following propositions, which are involved in the present case:

1. “The power of appointment to office is not, under our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, a function intrinsically executive, in the sense that

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it is inherent in, and necessarily belongs to, the executive department."

2. "Our form of government in its various changes has never recognized the power of appointment to office as an executive prerogative; the Constitution so far from treating it as an inherent executive power indicates that it belongs where the people choose to place it."

3. "The city of Baltimore and the counties are mere instruments of government appointed to aid in the administration of public affairs, and are parts of the State; as public corporations they are to be governed according to the laws of the land, and are subject to the control of the Legislature. The provision in the police law, which transfers to the commissioners, for the purposes of the new police, the use of the city property is constitutional and valid."

It was also held in the case last cited, as it was in all the others where the question was raised, that the requirement that the boards should be selected from the leading political organizations was merely directory, and did not affect the validity of the law.

The length to which this opinion has grown forbids a particular application of the authorities which support the proposition that the control of streets, the sewerage and water supply, the fire and police departments, in a populous city, are all subjects of public concern to the State, and therefore subject to legislative control. These subjects all relate to the public convenience, the public health and safety, and to the protection of persons and property.

An examination of the numerous authorities in which not only the general subject examined in this opinion, but every feature of the opposition to the enactments in question, has received the careful consideration of the courts of last resort, both State and National, and which have by their deliberate judgments again and again vindicated the constitutionality of legislation like that here assailed, leaves no room for doubt

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concerning the validity of these statutes. *State v. Smith*, 44 Ohio St. 348.

In this last case, it is tersely and accurately said that the distinctions sought to be made in some cases, in matters pertaining to the public and proprietary character of municipal corporations, are illusive and without foundation. 1 Dill. Munic. Corp., section 67; *People v. Draper*, *supra*; *Darlington v. Mayor*, 31 N. Y. 164 (193); *State v. Seymour*, 35 N. J. L. 47; *State v. Valle*, 41 Mo. 29; *Daley v. City of St. Paul*, 7 Minn. 390.

This legislation, it hardly needs be said, is to be construed with reference to the Constitution of Indiana as it is. It is the deliberate judgment of the writer, that, without in effect interpolating into our Constitution a provision similar to that contained in the Constitutions of the States of New York and Michigan, and also that which controlled the judgment in *State v. Kennon*, 7 Ohio St. 546, there can be no judicial authority found anywhere to support a conclusion adverse to any of the statutes the validity of which is in question.

Regretting the diversity of opinion which has resulted, the foregoing are the grounds upon which my dissent in this and the other similar cases is based.

Filed April 24, 1889.

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No. 14,841.

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BLEND ET AL.

CONSTITUTIONAL LAW.—*Metropolitan Police and Fire Department.*—*Act of March 7th, 1889.*—*Amendatory Act.*—The act of March 7th, 1889 (Acts of 1889, p. 222), providing for a board of metropolitan police and fire department in cities of twenty-nine thousand inhabitants, is not an amendatory act, but a new and independent one, and is, therefore, not in violation of section 21, article 4 of the Constitution, which provides that no act shall be revised or amended by reference to its title, but that the act revised or section amended shall be set forth in full.

SAME.—*Subject of Act.*—*Constitutional Requirement.*—The purpose of the Legislature in the passage of the act mentioned being to consolidate the police and fire departments under one management, the act, as it only embraces matters relating to that subject, does not violate section 19, article 4 of the Constitution, which requires that every act shall embrace but one subject and matters properly connected therewith.

SAME.—*General Law.*—*Uniform Operation.*—*Question for Legislature.*—It is for the Legislature and not for the courts to determine whether an act is in violation of section 23, article 4 of the Constitution, which provides that where a general law can be passed it shall be general and operate uniformly throughout the State.

SAME.—*Authentication of Act.*—*Passage Over Veto.*—Where an act is passed by both branches of the General Assembly, duly signed by the presiding officers and presented to the Governor, who vetoes it, after which it is reconsidered and passed by both houses, over the Governor's objections, in accordance with the constitutional requirements (section 14, article 5), it thereby becomes a law, without being again signed by the presiding officers or presented to the Governor to be by him filed in the office of the secretary of state.

SAME.—*Special Privileges and Immunities.*—*Right to Hold Office.*—*Residence and Political Tests.*—The act of March 7th, 1889, *supra*, in so far as it provides that the members of the boards thereby created shall be elected from opposite political parties and shall have resided in the cities affected for five years preceding their election, and that the members of the police and fire forces to be organized by them shall be chosen equally from the two leading political parties in such cities, is in violation of section 23, article 1 of the Constitution, which prohibits the Legislature from granting to any citizen or class of citizens special privileges or immunities.

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SAME.—Cities and Towns.—Local Self-Government.—Legislature may not Take Away.—The right of the inhabitants of cities and towns to control their local affairs can not be taken away by the Legislature, and the act of March 7th, 1889, placing the police and fire departments of certain cities, and the property connected therewith, together with the purchase of all supplies, etc., under the exclusive control of commissioners to be elected by the Legislature, is void, as being a denial of the right of local self-government.

SAME.—Appointment to Office.—Vacancy.—Power of Legislature.—The Legislature of this State has no power to fill a vacancy occurring in an office, whether of its own creation or otherwise, unless express provision therefor can be found in the Constitution.

SAME.—Appointment an Executive Function.—The power to appoint to office is an executive function, and while the Legislature may provide by law for the appointment of all officers not provided for in the Constitution, the appointing power must be lodged somewhere within the executive department of the government.

SAME.—Local Officers.—Legislature may not Appoint.—By force of section 18, article 5, and section 1, article 15 of the Constitution, the power to appoint certain officers of the State is reserved to the Legislature, but that department has no authority to appoint local officers, whether county, township, city or town, and the act of March 7th, 1889, assuming to confer upon it authority to appoint police and fire commissioners for cities, is void.

MITCHELL, J., dissents.

From the Vanderburgh Circuit Court.

D. B. Kumler, H. A. Mattison, A. Gilchrist and C. A. De-Bruler, for appellants.

J. S. Buchanan, C. Buchanan and P. W. Frey, for appellees.

BERKSHIRE, J.—The complaint filed by the appellees alleges that the Legislature of the State of Indiana passed an act which became a law on the 7th day of March, 1889, pursuant to which the relators were elected and duly qualified as members of the metropolitan police and fire board for the city of Evansville, with full power and control over the police and fire departments, and police department of said city, and full control over the property and records of said city belonging to the said departments.

It is alleged that the appellants refuse to recognize the

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authority of the relators, and refuse to turn over said property and records to them, and the prayer is for a writ of mandate to compel the appellants to recognize the authority of the appellees, relators, and requiring them to turn over the property of the city, together with the records belonging to the police and fire departments of the city.

An alternate writ is sued, to which two returns were made. The city of Evansville, John H. Dannettell, mayor of said city, Henry S. Bennett, John B. Uphaus, Thomas J. Groves, John Ingle, Henry Steckfleth, William Koelling, George Koch, William Heyns, Albert C. Rosencranz, Frederick J. Scholz, William W. Ross and Albert Johann, members of the common council, made one return, Alexander H. Foster, Edward E. Law and Adolph Goeke, members of the metropolitan police board, and George W. Newitt, the superintendent of the police department, made the other.

The court sustained demurrers to the returns, and a peremptory writ was ordered for want of a sufficient return.

It is disclosed in the record that the city of Evansville received its charter from the Legislature on the 27th day of January, 1847, and that by the charter the common council was given the control and management of the finances and of all the property of the city, and was authorized to purchase fire engines and fire apparatus, to organize fire companies, and to regulate and govern them; and that, under and by virtue of its charter, the said city has established a fire department, and the common council has managed the same for forty years, and acquired property for the use of said fire department to the value of \$100,000.

The record presents the following questions for consideration, all of which relate to the validity of the act of March 7th, 1889, and upon the determination of which the rights of the parties depend:

1. Is the act in violation of section 21, article 4 of the Constitution, which provides that no act shall be revised or

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amended by reference to its title, but that the act revised and section amended shall be set forth in full?

2. Is the act in violation of section 19, article 4, which requires that every act shall embrace but one subject and matters properly connected therewith?

3. Is the act in violation of section 23, article 4, which provides that when a general law can be passed it shall be general, and operate uniformly throughout the State?

4. Are the commissioners composing the metropolitan police and fire board officers who require commissions from the Governor to authorize them to qualify and enter upon the duties of their offices?

5. Is the act properly authenticated, or, rather, is there competent evidence of its having received such legislative sanction, after having received the Governor's disapproval, as to make it a law, if otherwise constitutional?

6. Is the act in violation of section 23, article 1 of the Constitution, which provides that the General Assembly shall not grant privileges or immunities to any citizen or class of citizens which upon the same terms shall not belong to all citizens?

7. Is the act in violation of the Constitution, in that it deprives the people of the city of Evansville of the right of local self-government?

8. Is the act in violation of the Constitution, in so far as it gives to the Legislature the power to appoint the commissioners composing the metropolitan board, and conferring upon the board the power to appoint inferior officers and employ policemen, firemen, etc.?

Since the appeal was taken it has been dismissed as to the city of Evansville, but this makes no difference in the consideration and determination of the case.

The title of the act is as follows: "An act providing for a board of metropolitan police and fire department in all cities of this State of twenty-nine thousand or more inhabitants according to the United States census of eighteen hun-

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dred and eighty, prescribing how the first members of said boards shall be elected and commissioned, and how their successors shall be appointed. Providing for the organization of the board, defining the duties of the commissioners composing the board, and of the boards; providing for the appointment of superintendent, officers, patrolmen, and other members of the police force, and for the appointment of a chief fire engineer, officers, firemen, and other employees of the fire department of such cities, and the manner of paying them for their services, giving said board full authority over the fire department of said cities, and authorizing the board to purchase all supplies, engines, ladders, wagons, horses and all equipments for said fire department, and prescribing how the bills for the same shall be audited, certified and paid; providing for the abolition of existing boards of police and fire department in such cities, and of the office of city marshal in such cities, and providing for other matters connected with the government of the police and fire department of such cities, repealing all laws in conflict with this act, especially an act providing for a metropolitan police in all cities of twenty-nine thousand inhabitants, etc., Acts 1883, p. 89, and declaring an emergency." Acts of 1889, p. 222.

Section 1 of this act provides that in all cities of this State where the population equalled twenty-nine thousand, according to the census of 1880 as taken by the United States government, there shall be established a metropolitan board of police and fire department, to consist of three commissioners; the members of the first board to be elected by the General Assembly, one of whom shall be of opposite politics to the other two; the secretary of the Senate and speaker of the House of Representatives to furnish a certificate of election to each commissioner, which is to be his authority to act as a member of the board. The said commissioners must have been residents of their respective cities for five years preceding their election.

Section 2 gives the board power to elect a secretary and

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property clerk, and requires him to give bond in such an amount and with such sureties as the board may see proper to require, and he shall receive such compensation as the board may fix, not to exceed \$1,500 per annum, and hold his office at the pleasure of the board.

Section 3 provides that the board shall have power to select a superintendent of police, captains, sergeants, detectives and such other officers and patrolmen as the board may deem advisable. These are to be selected equally between the two leading political parties of said city. These persons are to receive such compensation as the board shall determine, the superintendent not less than \$1,000 nor more than \$2,000; a captain not less than \$700 nor more than \$1,200; a sergeant not less than \$600 nor more than \$1,000; a patrolman not less than \$550 nor more than \$800 per annum. The compensation for all other officers and employees shall be fixed and determined by the board, not to exceed \$1,000 per annum. The board is empowered to remove or suspend all officers and persons employed on either force, at any time.

Section 4 gives full control of both departments to the board and the custody and control of all property, including station-houses, city prisons, patrol wagons, books, records and equipments belonging to the police department, and all engine-houses, engines, ladders, hose-reels, horses, wagons, books, records and all equipments and property of every description belonging to the fire department.

Section 5 provides that the board shall, immediately after its organization, assume and exercise the entire control of the fire department, and employ a chief engineer at a salary not to exceed \$2,000 per annum, appoint firemen and all necessary employees of the fire department and fix their compensation, and that they shall be selected equally between the two leading political parties of the city.

Section 6 provides that it shall be the duty of the board of aldermen and the board of common council, when there are the two, and when but one, the duty of the common council,

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to provide, at the expense of the city, all necessary accommodations within the city limits for station-houses, hook and ladder-houses, to furnish the same, to warm and light the same by day and by night, and to provide food for persons in the station-house, to provide at the expense of the city for the expense of the fire department incurred in the purchase of engines, ladders, hose, horses, or other necessary equipments ordered by said board, and for all expense incurred by said board in administering the fire department of said city; also, for such office expenditures, records, books, stationery, printing, furniture, and for the preservation, repair and cleaning of all buildings belonging to or in any way connected with the police and fire departments of the city.

It is then expressly provided that it is the intention and meaning of the act that all necessary expense of executing the duties imposed on the board, and maintaining the two departments, and which the board alone is authorized to incur, shall be a charge upon the city.

All expenditures are to be audited by the board, certified to as correct by its president and secretary, and at the close of each month deposited with the city clerk, who shall lay the same before the boards of aldermen and council, if there be two, or if but one, then before the common council, at the first meeting in each month, and said legislative bodies or body of such city shall make monthly appropriations for the payment of all such expenditures.

Section 8 we do not care to refer to. Section 9 abolishes the office of marshal, and confers all duties usually performed by him upon the police force.

Section 10 we do not care to refer to. Section 11 makes it a misdemeanor for any persons, corporation, common council, or other municipal, township, county or State officer or officers, to interfere in any way with the metropolitan board of police and fire department in the performance of its duties as defined in the act, subject to a fine of not less than \$100 nor more than \$1,000.

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Section 12 confers on the board authority to swear in any number of patrolmen to do duty at any place within the city, upon the application of any person or persons, at the expense of such person or persons. The other sections need not be referred to.

We are not of the opinion that the act of March 7th, 1889, is in violation of section 21, article 4 of the Constitution. It is not an amendatory act, but a new and independent act.

It is not our opinion that the act is in violation of section 19, article 4. The evident purpose of the Legislature was to consolidate the police and fire departments, in the cities embraced within the act, under one management, and the act only embraces matters relating to that subject.

To the objection that the act is in violation of section 23, article 4, the answer must be that the question is one for the Legislature, and not for the courts. *Wiley v. Corporation of Bluffton*, 111 Ind. 152.

It is not necessary for us to pass upon the question as to whether the commissioners composing the metropolitan board, as provided for in the act, are such officers as should be commissioned by the Governor, and we therefore leave the question open for future consideration.

In our opinion the objection that the act in question is not a valid and binding law, because not properly authenticated, is not a valid objection.

The act passed both branches of the General Assembly, was duly signed by the two presiding officers, and presented to the Governor. He returned it without his signature, and with objections, to the House of Representatives, the house wherein it originated; his objections were entered at large on the journals, and the bill reconsidered and passed by a majority of all the members elected to that house; it was then sent to the Senate, with the Governor's objections, reconsidered, and approved by a majority of all the members

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elected to that house. The moment it passed the Senate it became a law.

Thus reads the Constitution, article 5, section 14: "Every bill which shall have passed the General Assembly shall be presented to the Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that house shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other house, by which it shall likewise be reconsidered; and if approved by a majority of all the members elected to that house, *it shall be a law.*"

The Constitution does not require that it again be signed by the presiding officers of the two houses, transmitted to the Governor and by him filed in the office of the secretary of state. The reconsideration of a bill which has received the Governor's condemnation, by either branch of the General Assembly, is for such branch to further consider and act upon it, and when this is done and the bill has passed both houses by the required majority, the constitutional provision has been complied with. The evidence as to the passage of the bill is to be found in the journals of the two houses. *Evans v. Browne*, 30 Ind. 514, *Bender v. State*, 53 Ind. 254, and *Board, etc., v. Burford*, 93 Ind. 383, are not in opposition to the conclusion as here stated. Those cases rest upon section 25 of article 4 of the Constitution, which reads as follows: "A majority of all the members elected to each house shall be necessary to pass every bill or joint resolution; and all bills and joint resolutions so passed shall be signed by the presiding officers of the respective houses."

The one constitutional provision requires that the bill be signed by the presiding officers of the two houses, and the other that it shall become a law when it has been reconsid-

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ered and has passed the two houses by the required majorities.

The act under consideration classifies the citizens of Indianapolis and Evansville as to eligibility for commissioners of the metropolitan board: (1) Those who have resided in those cities for five years, and (2) those who have not. Those of the first class are eligible to be elected commissioners, and those who belong to the second class are ineligible. To the first class privileges and immunities are granted, which, upon the same terms, do not equally belong to the second class.

It is no answer to say that when those who belong to the second, or disqualified class, have resided in the city for the required length of time the disqualification is removed and they become eligible, for the reason that the five years' residence transfers them to the eligible class.

The act classifies the citizens of the two cities to which it applies, as to the positions and employments on the police force and in the fire department, by requiring that all officers and employees be selected from the two leading political parties found in these cities.

It is well known that members of probably a half-dozen political parties reside in these cities, and that a large number of citizens who belong to no particular party reside therein. All of these persons are disqualified for positions and employment in either of the departments named.

If it is competent for the Legislature to require, as a test for position or employment under the provisions of the act under consideration, membership in a political party or organization, it is difficult to understand why a religious or any other test may not be made.

We are of the opinion that in so far as the act creates a residence qualification or prescribes a political test, it contravenes the Constitution. It is not only in violation of the spirit, but of the letter of section 23, article 1. Upon a question so clear it would hardly seem necessary to cite authorities, but see Cooley Const. Lim. (5th ed.) 483; *Brown*

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v. *Haywood*, 4 Heisk. 357; *Louthan v. Commonwealth*, 79 Va. 196 (52 Am. Rep. 626); *Attorney General v. Board, etc.*, 55 Am. Rep. 675.

The city of Evansville has been under a charter granted by the Legislature in 1847, and until the passage of the act in question, and the appointment of the relators as commissioners, there has been no legislative interference with the fire department.

The metropolitan board which said act creates is given supreme control of both the police and fire departments of said city. It employs and controls the superintendents, officers, patrolmen, etc., of the police department, the chief engineer, officers, firemen, etc., of the fire department, determines the amount to be paid and manner of payment for services rendered in each of these departments, subject to certain limitations as to amounts, and is given exclusive authority to purchase wagons, hose, and all equipments for the fire department, and to determine the manner in which the bills shall be audited, certified and paid.

All property belonging to the said city for the use of each of these departments, by this legislative act is taken from the city, its officers and representatives, and turned over to the metropolitan board, which, so far as the fire department alone is concerned, is of the value of \$100,000; and said city is required to turn over all of its records relating to these two departments. The commissioners who compose the board are not the officers or representatives of the city, for it has no part in their selection, and no control over their action; they are appointed by the Legislature, and derive all authority from that high power. They are, therefore, the officers and representatives of the State, and not of the city. But, under the law, all expenses, of whatever kind, relating to these departments, the city has to pay. The commissioners audit the expenses of their management, and the president and secretary of the board certify the same monthly, and the city council, at its first meeting thereafter, is required to make

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appropriations to pay the same, without question as to the justness or correctness thereof. If the act related alone to the management of the police department, and the State was proposing to take upon itself the burden of maintaining the department, as well as its management, or if it were made to appear that the city had failed to furnish a police force, or one that was sufficient for the protection of persons and property, then a very different question would be presented for our consideration.

Except so far as an efficient police department goes, which is for the protection of the public at large, the people of the State are not interested in any of the matters to which the said act of the Legislature relates, but the citizens of Evansville and Indianapolis, the two cities to which the act applies, are alone interested. It, therefore, becomes a question whether or not the Legislature may take from the people of these two cities the right of local self-government, the right to manage and control their own purely local affairs in their own way, and place the management of all such local affairs under State control. We do not believe that the Legislature has any such power. Before written Constitutions, the people possessed the power of local self-government.

It is conceded that the people of Indiana originally possessed all governmental power, and it will not be questioned but that they still possess such of that power as has not been delegated. All the power which the people have delegated is what has passed from them by the Constitution. Pomeroy Const. Law (9th ed.), see title, "Centralization and Local Self-Government," sec. 151, *et seq.*; 1 Dillon Munic. Cor. (3d ed.), section 9; Cooley Const. Lim. (5th ed.) 225; *People v. Hurlbut*, 24 Mich. 44; *People v. Detroit Common Council*, 28 Mich. 228; *People v. Mayor*, 51 Ill. 17; *People v. Lynch*, 51 Cal. 15; *People v. Albertson*, 55 N. Y. 50; *People v. Porter*, 90 N. Y. 68.

The statute in question is a very remarkable statute, to say the least of it, and, if it became necessary, it would be a ques-

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tion for serious consideration whether it ought not to be held unconstitutional upon the ground that it is contrary to natural justice and equity. See *Pumpelly v. Village of Owego*, 45 How. Pr. R. 219, 246; *Bradshaw v. Rodgers*, 20 Johns. 103. Many other cases might be cited. We quote the following from *Atkins v. Town of Randolph*, 31 Vt. 226: "This view seems to be fully recognized and embodied in the learned and elaborate opinion drawn up by ISHAM, J., in the case of *Montpelier v. East Montpelier*, 29 Vt. 12. That case, moreover, as well as *Bowdoinham v. Richmond*, 6 Greenl. 112, demonstrates that some things are beyond the scope of legitimate legislation, as affecting municipal corporations, a doctrine entirely at variance with the idea of the illimitable supremacy of the law-making power over such corporations. The language of HUTCHINSON, J., in *Poultney v. Wells*, 1 Aik. 180, embodying the principle upon which the decision of that case was rested, is comprehensive, and to the point. He says, 'the court are unanimous in the opinion that the school right, thus appropriated by the charter, belongs to the town of Wells, so that the Legislature can exercise no power over it to vary its appropriation, without the consent of the town, and this consent must be by those who are inhabitants of the town at the time the assent is given.' See, also, *Moodaley v. Morton*, 1 Br. Ch. 469; * * *Fourth School District v. Wood*, 13 Mass. 192; 2 Kent Com. 275; *Ang. & Ames Corp.*, secs. 23, 24, 33; *Louisville v. University*, 15 B. Mon. 642. These cases, and many more that might be cited, fully indicate the double character which such corporations bear, and the rights which they have, and the relations which they sustain by virtue of each character respectively. They are expressions and illustrations of the reason why, from the fact of towns existing in organized corporations, *primarily* for certain public political purposes, as auxiliary to the practical government of the State, and as such, are under the absolute control of the Legislature, it does not follow that they, as organized corporations, or the inhabitants composing them, can be subjected, arbitrarily, to

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pecuniary burdens and liabilities, to be responded to either by the property of the town or of its inhabitants. In this case, the practical thing sought to be done under the law in question, is, that the town, nominally as a corporation, but in fact, the inhabitants of the town subject to taxation, may be compelled to appropriate so much of their property, proportionately, as shall be sufficient to pay for the liquors purchased by Mann, in his character of agent, whatever may be the amount. If through the artificial contrivance of municipal corporations, of which the inhabitants of the State must be members, *nolentes volentes*, such consequences can be wrought out, most persons would invoke the exercise of the annihilating power of the government over such corporations, rather than of the power of the police regulation, in virtue of which alone, this provision of the law is sought to be sustained."

The liquor, the price and liability for which were involved in the foregoing case, was sold to one claiming to be an agent of the town, receiving his authority from a commissioner appointed for the county in which the town was situated, pursuant to an act of the Legislature of Vermont, the object of the act being to regulate and restrict the sale of intoxicating liquor, which it was claimed was a police regulation. The language and reasoning in the case are very much in point in the case under consideration. See 1 Dillon Munic. Corp., p. 97, section 73.

The Constitution very fully recognizes local self-government.

Section 6, article 6, makes provision as to where county, township and town officers shall reside.

Section 8, same article, gives to the General Assembly power to provide by law for the impeachment of those officers.

Section 10, same article, provides and gives to the Legislature the power of conferring upon county boards powers of a local administrative character.

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Section 3, article 9, grants to county boards the power to provide county asylums.

Section 14, article 7, provides for the election of justices of the peace in the several townships.

In clause 4 of the schedule, municipal corporations are continued in force until modified or repealed.

No provision is found anywhere in the Constitution which takes from the people the right of local self-government.

The last question which we desire to consider is as to the power of the Legislature to create an office and appoint the incumbent.

Article 3, section 1, of the Constitution, divides the governmental powers into three departments, to wit: the legislative, executive and judicial; and it is expressly further provided that no person who is charged with official duties under one of these departments, shall exercise any of the functions of the other, except as in this Constitution expressly provided.

It is contended by the appellees that the legislative department is closer to the people than are the other departments, and therefore its powers are more extended than are the powers granted to the other departments. This position can not be successfully maintained.

As all governmental power originally rested with the people, it must necessarily still be lodged with them, except so far as they have delegated it in the Constitution. This being true, whatever power has in the Constitution been delegated to the Legislature, it possesses; so with the executive, and so with the judicial departments. No general grant of power other than that which is legislative can be found in the Constitution. In the exercise of that power it is supreme, except where the Constitution has placed restrictions upon it.

All departments of the State government, but each in its respective domain, represent the people, and, except where otherwise provided in the Constitution, the incumbents are

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elected from the people, by the people, and are responsible to the people. Neither department can encroach upon the jurisdiction and functions of the other, unless authority therefor is found in the Constitution. *Wright v. Defrees*, 8 Ind. 298; *Waldo v. Wallace*, 12 Ind. 569; *Trustees, etc., v. Ellis*, 38 Ind. 3; *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427; *Butler v. State*, 97 Ind. 373; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185.

What we here decide is not in conflict with *McComas v. Krug*, 81 Ind. 327, *Hedderich v. State*, 101 Ind. 564, and other cases of like import. What these cases decide is, as we have stated above, that the Legislature is supreme in the exercise of legislative power, except as limited by the Constitution, and so with the other departments. *Lafayette, etc., R. R. Co. v. Geiger, supra*.

This leads to the inquiry, what is legislative power? and upon that subject there is an abundance of authority.

The word "legislative" is defined by Worcester as follows: "That makes or enacts laws; law making. 'Legislative power.' Of, or pertaining to, legislation or to a Legislature, as, 'Legislative proceedings.' " "Legislative" is defined by Zell as follows: "Making, giving, or enacting laws. Relating or pertaining to the passing of laws." Webster defines "legislative" as follows: "Giving or enacting laws; as, a legislative body. Pertaining to the enacting of laws; suitable to laws; as, the legislative style. Done by enacting; as, a legislative act." Wharton, in his lexicon, defines "legislation" as follows: "The act of giving or enacting laws." "Legislature: the power to make laws." Abbott, in his law dictionary, under the head of "legislate," has the following: "To make laws. * * Legislature: the body of persons in the State clothed with authority to make laws. * * Legislative power: that one of the three great departments into which the powers of government are distributed—legislative, executive and judicial—which is concerned with enacting or establishing, and incidentally with repealing, laws."

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We find the following in *Sinking-Fund Cases*, 99 U. S. 700, 761, speaking of the judicial and legislative departments: "The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." Legislative power is the power to enact, amend or repeal laws. *Lafayette, etc., R. R. Co. v. Geiger, supra*; Cooley Const. Lim. 90; *Hawkins v. Governor*, 1 Ark. 570; *Wayman v. Southard*, 10 Wheat. 1, 46; *Greenough v. Greenough*, 11 Pa. St. 489.

When we come to examine article 4 of the Constitution, we find that the powers and restrictions put upon the legislative department are more specifically and definitely prescribed than are those of either of the other departments.

Article 4 is composed of many sections, but they all relate to the exercise of legislative power and matters incidentally connected therewith. Section 16 of that article reads: "Each house shall have all powers necessary for a branch of the legislative department of a free and independent State."

We quote the following from a very able opinion by Chief Justice THOMPSON, in *Page v. Allen*, 58 Pa. St. 338 (98 Am. Dec. 272): "The expression of one thing in the Constitution, is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things enumerated,' expresses a principle of common law applicable to the Constitution, which is always to be understood in its plain, untechnical sense. *Commonwealth v. Clark*, 7 W. & S. 127."

If article 3, section 1, had never been placed in the Constitution, the rule of construction as stated by Judge THOMPSON and Lord Bacon, applied to section 16 of article 4, *supra*, would exclude the Legislature from exercising any other than legislative power. But the framers of the Constitu-

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tion were not satisfied, after the experience that the people had had under the old Constitution, to rely upon the well known rules of legal construction, and, therefore, section 1, article 3, was placed in the Constitution, expressly confining each department to its own jurisdiction and functions, except so far as expressly provided otherwise.

The power to appoint to office is not a legislative function, but belongs to the executive department of the government. *Lafayette, etc., R. R. Co. v. Geiger, supra*; *Cooley Const. Lim., supra*; *Hawkins v. Governor, supra*; *Wayman v. Southard, supra*; *Greenough v. Greenough, supra*; *Broom Const. Law, 524.*

The conclusion must necessarily follow, that the Legislature of this State has no power to fill a vacancy occurring in an office, whether of its own creation or otherwise, except express provision therefor can be found in the Constitution.

The word "expressly," being the word that is employed in the constitutional provision, section 1, article 3, Worcester defines as follows: "In direct terms; plainly." He defines the word "express" as follows: "Given in direct terms; not implied; not dubious; clear; definite; explicit; plain; manifest." The word "expressly" is defined by Zell as follows: "Not by implication; plainly; distinctly." The word "express" he defines as follows: "To set forth in words; * * clear, plain, direct; not ambiguous."

Webster's definition of "expressly" is: "In an express, direct, or pointed manner; in direct terms; plainly." His definition of the word "express" is: "Directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear, plain."

In looking over the Constitution it is evident that the framers of the same believed that some such power had been lodged with the Legislature.

Section 18, article 5, provides that when, during the recess of the Legislature, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly, etc.

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Section 30, article 4, provides that no senator or representative shall, during the term for which he may have been elected, be elected to any office, the election to which is vested in the General Assembly.

Section 13, article 2, provides that all elections by the people shall be by ballot, and by the Legislature, *viva voce*.

Section 10, article 4, confers on each house the right to choose its own officers, but this is not an election by the General Assembly, such as is referred to in articles 2, 4 and 5.

Article 5, section 5, gives to the Legislature the power of electing a Governor or Lieutenant-Governor when there is a tie, but this is not an election such as is referred to in section 18 of the same article, for no vacancy can occur during a recess of the General Assembly; nor is it such an election as is referred to in article 4, because the choice must be made from the two highest candidates voted for by the people. The election of a United States senator is not the election referred to in article 4, for a member of the Legislature has never been regarded as ineligible to that office. Whatever power the Legislature may have to elect or appoint to office must relate exclusively to State offices. No other construction can be given to section 18 of article 5. It reads: "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any *other* State office," etc.

After providing for the election of certain county officers, section 3, article 6, goes on to provide that other county and township officers shall be elected or appointed in such manner as may be prescribed by law.

Section 9, same article, provides that vacancies in county and township offices shall be filled as may be prescribed by law.

Taking these different sections together, it is evident that it was not the intention of the framers of the Constitution to confer upon the Legislature the power to elect or appoint

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county or township officers, and the Legislature has never claimed or exercised this power.

The only other section of the Constitution relating to the subject under discussion is section 1, article 15. That section reads as follows: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as *now is*, or hereafter may be, prescribed by law."

The Constitution went into force on the 1st day of November, 1851. At that time there were certain officers who were appointed by the General Assembly, all of whom were State officers, as distinguished from local officers, such as county, township, town and city officers.

Counsel for the appellants contend that the adoption of the Constitution wiped out all such officers, except as saved by the 9th clause of the schedule. This contention is in the face of the 4th clause of the schedule, which is as follows: "And all laws now in force, and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed;" and, in addition, the constitutional provision which we are now considering expressly continued the mode of appointment until a different mode should be prescribed by law.

The words "now is," as contained in the said section, continued with the legislative department the power to appoint such officers as it had the right to appoint on the 1st day of November, 1851.

The words "or hereafter may be prescribed by law," which we find in the constitutional provision, confer upon the General Assembly the power to prescribe the mode of appointment. Prescribing the mode of appointment is one thing, making the appointment is another. One is the exercise of legislative power, the other the exercise of an executive function.

As the Legislature is limited to the exercise of legislative power, except when otherwise expressly provided, its power

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cases when it prescribes the mode of appointment to office, except in cases where express power is given to make appointments. We quote from *Jones v. Perry*, 10 Yerger, 59 (20 Am. Dec. 430, see p. 436): "The fact that the Constitution may prescribe that the mode of appointing the judges shall be by the Legislature does not constitute the Legislature the constituent." See *State v. Kennon*, 7 Ohio St. 546 (560). The Constitution confers upon the Legislature power to organize courts and provide for their jurisdiction, but it can not exercise judicial power. The officers which the Legislature is given the power to appoint are a class of State officers. No other construction can be given to section 18, article 5 of the Constitution, which reads: "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of judge of any court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

The antecedent to which the words "any other State office" relate is an office "the appointment to which is vested in the General Assembly." Whatever of the offices now in existence, which were in existence when the Constitution was adopted, to which the Legislature appointed the incumbents, section 1, article 15, *supra*, continued the appointing power in the Legislature, and so with the other governmental departments, except so far as has otherwise been provided by law. The Legislature may provide by law for the appointment of all officers not provided for in the Constitution, but the appointing power must be lodged somewhere within the executive department of the government. The only offices now in existence that existed when the Constitution was adopted, to which the General Assembly exercised the power of appointing the incumbents, are, so far as we have been able to ascertain, the State librarian, warden of the State's prison

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at Jeffersonville—State Prison South—and the trustees of the insane asylum. There may be others; if so, I have overlooked them. (R. S. 1843, p. 101; Local Laws, 1845, p. 35; Acts of 1847, p. 99; Acts of 1848, p. 83.) The trustees of the blind asylum and of the deaf and dumb asylum were appointed by the Governor. (Acts of 1845, p. 56; Acts of 1846, p. 19; Acts of 1847, p. 41.) Practical construction is of very little consequence when it is exercised in violation of the plain provisions of the Constitution.

We are not of the opinion that the Legislature has any power to appoint local officers, county, township, city or town. We have not overlooked the case of *Collins v. State, ex rel.*, 8 Ind. 344. The question now under consideration was not raised or discussed in that case. The question considered and decided was as to the right of the Governor, under the circumstances, to make the appointment, no vacancy having occurred during a recess of the General Assembly. The case of *State, ex rel., v. Harrison*, 113 Ind. 434, is not in conflict with our conclusion. We cite the following additional authorities bearing upon the question of legislative power. We quote: "Under our form of government the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void." *Taylor v. Porter*, 4 Hill, 140 (40 Am. Dec., at p. 277). *Pumpelly v. Village of Owego*, 45 How. Pr. R. 219, 247; *Campbell's Case*, 2 Bland Ch. 209 (20 Am. Dec., see p. 373).

A law may be within the inhibitions of the Constitution as well by implication as by expression. *Page v. Allen*, 58 Pa. St. 338 (98 Am. Dec. 272). And when it is, it is the duty of the courts to so declare. *Page v. Allen, supra*; *People v. Gillson*, 109 N. Y. 389 (4 Am. St. Rep. 465); *Flint*

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River Steamboat Co. v. Foster, 5 Geo. 194 (48 Am. Dec. 228); *Bailey v. Philadelphia, etc., R. R. Co.*, 4 Har. 389 (44 Am. Dec. 593); *Boston v. Cummins*, 16 Geo. 102 (60 Am. Dec. 717).

We are of the opinion that if the Legislature had no power to appoint the commissioners, this alone would strike down the law. We quote from *Mayor, etc., v. State*, 15 Md. 376 (74 Am. Dec. 572): "At the very threshold the relators are met with the objection that the law is radically void, because the Legislature had no power to appoint the commissioners in the act. It is plain that this point, if well taken, strikes down the law at one blow, because, if not validly appointed, they can not proceed to put it in force, and all other instrumentalities must fail."

We hold the law unconstitutional in all of its parts.

The judgment is reversed, with costs.

MITCHELL, J., dissents, for the reasons given in *State, ex rel., v. Denny, ante*, pp. 382, 411.

Filed April 24, 1889.

SEPARATE OPINION.

ELLIOTT, C. J.—I fully concur in the general conclusions announced in the principal opinion, but do not fully concur in all of the reasoning.

Filed April 24, 1889.

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No. 14,836.

THE STATE, EX REL. HOLT ET AL., v. DENNY, MAYOR,
ET AL.

CONSTITUTIONAL LAW.—*Authentication of Act.—Passage Over Veto.*—Where a bill, which has been passed by both houses of the General Assembly and duly signed by the presiding officers thereof, is vetoed by the Governor, and afterwards reconsidered by the General Assembly and passed over the Governor's objections, in accordance with section 14 of article 5 of the Constitution, it becomes a law without being attested a second time by the presiding officers.

SAME.—*Legislative Journals.—Evidence of Passage of Act.*—The journals of the two houses of the General Assembly, upon which the Governor's objections to a bill are required to be entered, and which show the passage of the bill notwithstanding such objections, are public records, to which the court may look, and are proper evidence of the passage of the bill over the veto.

SAME.—*Municipal Corporations.—Local Self-Government.—Appointment to Office.—Power of Legislature.*—The right of local self-government in towns and cities was not surrendered upon the adoption of the Constitution, but is still vested in the people of the respective municipalities, and the Legislature can not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and the duties of the officers.

SAME.—*Fire Department.—Local Control.—Legislative Interference.*—The right to provide and maintain a fire department in towns and cities is vested in the inhabitants of the respective municipalities, as an element of local self-government, and is not subject to legislative interference, except in so far as the General Assembly may prescribe rules to aid the people in the exercise of such right.

SAME.—*Police and Fire Act of March 7th, 1889.—Invalidity of.*—The act of March 7th, 1889 (Acts of 1889, p. 222), creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the Legislature, and giving them exclusive control of the police and fire departments of such cities and of matters connected therewith, is void, in so far as it relates to the fire department, as being in violation of the right of local self-government; and as the provisions of the act in relation to the police department are so connected with and dependent upon its other provisions as to be practically inseparable, the whole act falls.

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SAME.—*Special Privileges and Immunities.—Right to Hold Office.—Residence and Political Tests.*—The provision in the act of March 7th, 1889, *supra*, that the commissioners of the police and fire departments therein provided for shall have resided in the city for which they are elected for five years next preceding their election, and that the members of the police and fire forces to be organized under said act shall be chosen equally from the two leading political parties of the city, is in violation of section 23 of article 1 of the Constitution, which prohibits the granting of special privileges or immunities.

Mitchell, J., dissents.

From the Marion Superior Court.

J. S. Duncan and *C. W. Smith*, for appellants.

L. T. Michener, Attorney General, *W. L. Taylor*, *A. C. Harris*, *W. H. Calkins*, *F. Winter*, *R. O. Hawkins*, *C. F. Griffin* and *J. H. Gillett*, for appellees.

OLDS, J.—This is a proceeding to test the right of the board of metropolitan police and fire department of the city of Indianapolis, elected by the General Assembly of the State of Indiana, March 9th, 1889, under the provisions of enrolled act No. 83, House of Representatives, to the possession, custody and control of the station-house, city prison, patrol wagon, books, records and equipments belonging to the police department of said city; also, the possession, custody and control of all engine-houses, engines, ladders, hose-reels, horses, wagons, books, records, and all the equipments and property of every description belonging to the fire department of said city, and to determine the right of the said board of metropolitan police and fire department of the city of Indianapolis to discharge the duties of their office as defined and prescribed by said enrolled act No. 83.

The questions presented by these proceedings relate to and involve the validity of said act.

The first question presented is, whether the act involved has been properly certified so that the courts can take judicial knowledge of it as a law?

The second question challenges the authority of the General Assembly to enact a law of like scope, tenor and effect

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to the one in question, and requires an adjudication as to its constitutionality and validity.

The law in question provides that in all cities of this State of twenty-nine thousand or more inhabitants, according to the United States census of 1880, there shall be established within and for such cities a board of metropolitan police and fire department, to consist of three commissioners. The members of the first board or boards, under the act, shall be elected by the General Assembly upon the taking effect of the act, one of whom shall be of opposite politics to the other two, one to serve until January 1st, 1893, one until January 1st, 1892, and one until January 1st, 1891, their successors and succeeding members to be appointed by the mayor of said cities, and the terms of those thus appointed shall be three years ; that the said commissioners shall have resided in such cities for at least five years next preceding their election ; that, before entering upon their duties, they shall take an oath of office before the clerk, and a further oath that in any appointment or removal to be by them made to or from the police force or fire department created and to be organized by them under the act, they will in no case, and under no pretext, appoint or remove any policeman or officer of police, or fireman or officer of the fire department, because of any political opinion held by any such person, or for any other cause or reason than fitness or unfitness of such person. The commissioners are required to give bond, and shall each receive a salary of \$600 per annum, payable monthly out of the city treasury. They shall elect one of their number to act as president, who shall be *ex officio* a member of the board of health of such city. They shall elect some person not a member of the board to act as secretary and property clerk, who shall give bond, and receive a salary not exceeding fifteen hundred dollars per annum. The said board shall have power to select a superintendent of police, captains, sergeants, detectives, and such other officers and patrolmen as the board may deem advisable, said captains, sergeants, detectives, and

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other officers and patrolmen to be selected equally between the two leading political parties of said cities. Said board shall not have power to appoint more than one patrolman for each ten hundred inhabitants of said city, except in cases of emergency. The officers and patrolmen shall receive such compensation as the board shall determine—the superintendent not less than one nor more than two thousand dollars per annum; captain not less than seven nor more than twelve hundred dollars; sergeant not less than six nor more than ten hundred dollars; patrolmen not less than five hundred and fifty nor more than eight hundred dollars; and the salaries of other officers to be fixed by the board. All members of the force shall be able to speak the English language. The board shall have power to remove or suspend any member of the force, and provide rules of discipline, and to make and promulgate general and special orders through the superintendent, who shall be the executive head of the force. Said commissioners shall, immediately after their organization, assume and exercise the entire control of the police force and fire department of such city, and shall possess full and exclusive power and authority over the police organization, government, appointments and discipline within the city. They shall have the custody and control of all public property, including station-houses and city prisons, patrol wagons, books, records, and equipments belonging to the police department; all engine-houses, engines, ladders, hose-reels, horses, wagons, books, records, and all equipments and property of every description belonging to the fire department of such city. The act abolishes all other police and fire boards, and officers and forces maintained under any other law, and makes them unlawful.

The act further provides that said board shall immediately assume and exercise the entire control of the fire department of such city, and appoint a chief fire engineer at a salary not exceeding \$2,000; appoint firemen and all necessary employees of the fire department and fix their compensation,

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said firemen and employees to be selected equally from the two leading political parties of said city.

It is provided in detail that the board shall have exclusive control and management of the police and fire departments of such cities, and made the duty of the board of aldermen and common council of such city as shall have two boards, and of the common council of such as has but one board, to provide, at the expense of such city, all necessary accommodations within the city limits for station-houses, engine-houses, hook and ladder-houses, to furnish, warm and light the same, provide food for prisoners detained in the station-houses—in short, to provide everything necessary for the departments, and to pay all the expenses of maintaining the departments of police and fire.

It is further made unlawful, and punishable by fine and dismissal from the service, for any member of the police force or fire department, while on duty, to solicit any person to vote at any general or special election for any candidate for office, or to challenge any voter, or in any manner attempt to influence any elector at such election, or to be a delegate or candidate to any political convention, or to solicit votes for any candidate from any delegate to any such convention. There is an emergency clause. The bill is signed by the president of the Senate and speaker of the House and attested by the clerk of the House. There is also a certificate of the clerk of the House and secretary of the Senate. The certificate of the clerk of the House sets forth the fact that the bill was, on the 7th day of March, 1889, returned to the House with the objections of the Governor, and that the objections were spread upon the journal and the bill again passed, by a vote of 54 ayes and 39 nays; and the certificate of the secretary of the Senate certifies that upon the bill having passed the House, notwithstanding the Governor's objections thereto, the same was transmitted to the Senate, and it was then ordered that the Governor's objections be spread in full upon the journal, which was done, and the bill passed, not-

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withstanding the objections of the Governor thereto, by a vote of ayes 27, nays 19.

It is urged that the act is not properly certified so that the courts will take judicial knowledge of it as a law. It is contended by counsel for appellees that to entitle it to the solemnity and force of a law, after it was vetoed by the Governor and passed by both houses of the General Assembly, it must be again attested by the presiding officers of the two houses, as required by section 25, article 4, on its original passage. That unless it be so attested, courts will not take cognizance of it as a law. That courts can only look to the bill itself, and not to the journals of the two houses of the General Assembly, to determine whether or not the bill was passed over the objections of the Governor.

Section 14, article 5, provides: "Every bill which shall have passed the General Assembly shall be presented to the Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that house shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other house, by which it shall likewise be reconsidered; and if approved by a majority of all the members elected to that house, it shall be a law." It will be seen by this section that no attestation by the presiding officers is required, but it expressly declares "it shall be a law." It seems to us clear that the Constitution does not require an attestation of the bill a second time, or after it has been passed over the objections of the Governor, and that section 25, article 4, has no relation to the passage of a bill after it has been vetoed. It is held in the case of *Evans v. Browne*, 30 Ind. 514, that the courts must, for themselves, ascertain what is the public law of the State, and that the courts can not look beyond the enrolled act and its authentication to determine the validity of an act.

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The act under consideration by the court in that case was properly certified and had not been vetoed, but became a law without executive approval. The decision of the court was, that when an act appeared regular upon its face, and properly certified by the presiding officers and found with the proper custodian, the courts would not look to the journals to determine whether or not, at the time the bill was voted upon and passed, there was a quorum present in each house, and whether all the provisions of the Constitution had been complied with in its enactment; that, in such a case as was then before the court, the attestation of the presiding officers was conclusive evidence of the regularity of the proceedings in both houses of the General Assembly in the passage of the act; that the Constitution declared the mode by which such bill should be certified, and such certificate was conclusive as to the regularity of its enactment and could not be contradicted by the journals.

By section 12, article 4, it is declared that "Each house shall keep a journal of its proceedings, and publish the same. The yeas and nays, on any question, shall, at the request of any two members, be entered, together with the names of the members demanding the same, on the journal."

In the case of *Evans v. Browne*, *supra*, the court says: "The enrolled acts, with their authentication, are deposited in a public office, and are there accessible to everybody. The journals are public documents, at least, if not records; and are also within reach of all. Whatever, affecting the question of a quorum, such as the resignation of members, may have been lodged with the Governor, may also be inspected. In short, every fact upon which, in any view, depends the question whether a document purporting to be a statute has, by legislative action, been invested with the force of law, is, in its nature, a public fact which may be easily ascertained; it is a fact of public current history, and there is therefore no necessity for bringing it to judicial knowledge by the finding of an issue."

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This discussion by the court in that case is in harmony with our views.

In the case of the passage of bills notwithstanding the objections of the Governor, the Constitution does not require the attestation of the same by the presiding officers of the two houses of the General Assembly. Nor does it require any attestation or certificate by any officer, but expressly declares that "it shall become a law."

The journals of the two houses upon which the objections of the Governor are required to be entered at large, and showing the passage of the bill notwithstanding the Governor's objections, are public records, to which the court may look, and are proper evidence of the passage of a bill after the same has been returned with the objections of the Governor, and if a bill is so passed it becomes a law. If the Constitution required an attestation by the presiding officers after its passage over the Governor's objections, as it does in case of the original passage of bills before presentation to the Governor, then such certificates would be the proper and conclusive evidence of the passage; but, as we have stated, vetoed bills are not required to be so certified, and there is no record or evidence of such passage required to be kept, except the journals of the two houses. The cases of *Evans v. Browne*, *supra*, *Board, etc., v. Burford*, 93 Ind. 383, and authorities cited in support of the same, are not in conflict with the principle we have announced. The acts under consideration in those cases were not vetoed, and were properly certified and placed in the proper depository, and the court refused to go behind the proper attestation by the signatures of the speaker of the House and president of the Senate, and institute an investigation to ascertain whether or not all constitutional requirements had been complied with in the passage of the acts and in the presentation of the same to the Governor.

In this case it is conceded that the bill was passed as required by the Constitution, but it is contended that it must

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be attested by the presiding officers after such passage, in order to become a law and to be recognized by the courts as a law. We do not think this objection well taken.

We next consider whether or not the act and its provisions are within the scope of legislative authority under the Constitution of the State.

It is contended by counsel for appellants that, by the Constitution of the State, all power is vested in the legislative department of the government, except such as is expressly granted to the executive and the judiciary, or retained by the people, in the Constitution itself. We are not in harmony with counsel's theory of our State government, but we state it this way.

At the adoption of the State Constitution all power was vested in the people of the State. The people still retain all power, except such as they expressly delegated to the several departments of the State government by the adoption of the Constitution. The legislative, executive and judicial departments of the State have only such powers as are granted to them by the Constitution. In the first section and first article of the Constitution it is declared "that all power is inherent in the people." It is contended by counsel that as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted, except such as were expressly reserved. The peculiarity of the theory is, that while the people, by the Constitution, made grants of power to three different departments of government, it is contended that all power that was at that time in the grantor, the people, passed to one branch of the government, viz., the political or legislative branch, and that it took all power not mentioned in the instrument, and the executive and judiciary took only such as was expressly granted to them, and the people retained such only as was specifically named and reserved. It is certainly a novel method of construction, and contrary to all the rules for construing contracts, deeds, wills and other written instruments, and it seems to us that

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the proposition need but to be stated to prove its fallacy. In construing and giving an interpretation to the Constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities and towns and the right of local self-government exercised by them, and the laws in force and form of government existing at the time of its adoption.

One of the fundamental principles of municipal corporations is the right of local self-government, including the right to choose local officers to administer the affairs of the municipality. 1 Dillon Munic. Corp. (3d ed.), section 11, states the law as follows: "To civil territorial divisions, erected into corporations with defined powers of local administration, and the extension of the right to vote for officers, to all who are to be affected by their action, are due that familiarity with public affairs and that love of liberty and regard for private rights and property, which are characteristic of the best government in Europe, Great Britain, and the best in America, the United States." Section 183: "The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government." Justice BROWN, in the case of *People v. Draper*, 15 N. Y. 532, 561, says: "We learn from Blackstone, and the elementary writers, that the civil divisions of England, its counties, hundreds, tithings, or towns, date as far back as the times of the great Alfred. In all the changes of policy, of dynasty, of peace and internal war, and even of conquest, which that country has undergone since his day, these organizations have never been abated or abandoned. They are substantially at this time what they were before the Norman invasion. Wherever the Anglo-Saxon race have gone, wherever they have carried their language and laws, these communities, each with a local administration of its own se-

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lection, have gone with them. It is here they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and the knowledge of civil government, which distinguish them from every other people. Here have been the seats of modern civilization, the nurseries of public spirit, and the centers of constitutional liberty. They are the opposites of those systems which collect all power at a common center, to be wielded by a common will, and to effect a given purpose; which absorb all political authority, exercise all its functions, distribute all its patronage, repress the public activity, stifle the public voice, and crush out the public liberty."

In the case of *People v. Albertson*, 55 N. Y. 50, the court says: "This right of self-government lies at the foundation of our institutions, and can not be disturbed or interfered with, even in respect to the smallest of the divisions into which the State is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned; especially by the courts, when such acts become the subject of judicial investigation."

We might quote from numerous other authorities to the same effect as the above, but we have quoted sufficient to show that the right of local self-government, including the right of the people of a municipality to select their own officers, was a sacred fundamental principle and idea of municipal corporations, well founded, sacredly guarded, and long enjoyed by the people of the State at the time of the adoption of the Constitution.

As we interpret the theory of our State government, this right of local self-government, vested in, exercised and enjoyed by, the people of the municipalities of the State at the time of the adoption of the Constitution, yet remains in them, unless expressly yielded up and granted to one of the branches of the State government by the Constitution. And

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in the decision of the question presented in this case, it is only necessary to determine whether or not that power is granted to the legislative branch of the government, as it is only it which has attempted to deprive the people of cities of the right to choose their own officers and administer their local affairs. We will therefore look to the Constitution to determine what power is granted to that branch of the State government.

Section 1, article 3, is as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution *expressly provided.*"

Section 1, article 4, declares: "The legislative authority of the State shall be vested in the General Assembly." Legislative authority is the power to make laws, alter and repeal them. Cooley Const. Lim., pp. 90, 91; *Hawkins v. Governor*, 1 Ark. 570 (591); *Greenough v. Greenough*, 11 Pa. St. 489; *Wayman v. Southard*, 10 Wheat. 1; *In re Canada R. W. Co.*, 7 Fed. Rep. 653. How were these sections understood by the framers of the Constitution?

Mr. Biddle, a member of that body, said: "The great fundamental idea in all the American constitutions is, that the powers of government shall forever be kept apart, and exercised separately. This is the basis of the Constitution of the United States, and of every separate State. No gentleman on this floor will deny this proposition. And I have often thought that we are indebted to that one principle more than to any other, or perhaps to all others, for the freedom we enjoy as Americans. We set out in our bill of rights by declaring that the powers of the government of Indiana shall be divided into three distinct departments, and each of them be confided to a separate magistracy. Those which are legislative to one; those which are judicial to another; and those

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which are executive to a third. And no person being of one of these departments, shall exercise any power which properly belongs to another.

“Now, Mr. President, I desire briefly to examine these powers separately, and then their true relation to each other. We settled in the beginning that the legislative authority of this State shall be vested in the General Assembly, which shall consist in a Senate and House of Representatives. Let me remark in passing, that the Governor finds no place in this provision—the duties and powers of the executive are in no manner connected with it. Nor is there here any trace of judicial power. What is the legislative power? It is that power by and through which a State makes its laws. In a free country like our own, law is but the formal expression of the opinions, wants, desires, and wishes of the people. The people send up their representatives to make their laws in accordance with the will of their constituency. The Legislature is the mouth-piece of the State, by which it expresses its voice. The better to regulate this power, it is divided into two houses, each representing different divisions of a common constituency, and holding their offices by a different tenure as to time. This insures the true expression of the general voice, without regard to any particular time or locality. It also gives order and consistency to legislation. Each house is a check upon the other. The General Assembly has no other duty nor power, than to make laws. After a law has been enacted this department has no further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books, and for any function still remaining in the legislative power, there it would forever remain. All the power of this department here ends.”
2 Const. Debates, 1323.

In the case of *De Chastellux v. Fairchild*, 15 Pa. St. 18 (53 Am. Dec. 570, 571), GIBSON, C. J., in delivering the opinion, said: “The power of the Legislature is not judicial.

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It is limited to the making of laws ; not to the exposition or execution of them."

By the sections of the Constitution above quoted, it is clear there is no power granted to the legislative branch of the government except to make laws, and that the power conferred was properly defined by Judge Biddle, when he said: "The General Assembly has no other duty nor power, than to make laws. After a law has been enacted this department has no further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books, and for any function still remaining in the legislative power, there it would forever remain. All the power of this department here ends." This interpretation of legislative power by Judge Biddle in the constitutional convention was not challenged or denied.

It is manifest that the framers of the Constitution used, and the people in adopting it understood, the words "The legislative authority of the State shall be vested in the General Assembly," with a view of vesting in the General Assembly only the right to make laws, and did not by the use of these words intend to surrender the right of local self-government, and the right of choosing their own local officers and rulers, or to delegate such power to the General Assembly.

The word "town" is generic, comprehending cities, so held in the case of *Flinn v. State*, 24 Ind. 286. In 1 Blackst. Com., by Chitty, top pp. 81, 82, the word town is defined as follows: "The word *town* or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns."

The existence of towns and cities is recognized in the State Constitution.

Section 22, article 4, provides that no local or special law shall be passed "vacating roads, town plats, streets, alleys, and public squares."

Section 6, article 6. "All county, township, and town of-

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ficers shall reside within their respective counties, townships, or towns; and shall keep their respective offices at such places therein, and perform such duties as may be prescribed by law."

Section 8, article 6. "All State, county, township, and town officers may be impeached, or removed from office, in such manner as may be prescribed by law."

Section 9, article 6. "Vacancies in county, township, and town offices shall be filled in such manner as may be prescribed by law."

Certainly, by none of the sections of article 6 do the people part with the right of local self-government, in so far as the choosing of their own county, township and town officers is concerned. Towns are classed alike with the other subdivisions of the State—counties and townships. If the people parted with the right to choose their city and town officers by either of these sections, they also parted with their right to select and choose their county and township officers. By section 6 it is made imperative on such officers to reside and keep their offices within their respective counties, townships and towns, and perform such duties as may be prescribed by law.

This section vests in the Legislature the right to prescribe the duties of such officers. Section 8 grants the right to the legislative department to prescribe the manner in which such officers may be impeached, and section 9 vests in the Legislature the power to prescribe the manner in which vacancies in county, township and town offices may be filled, but vesting in the legislative department the power to prescribe the manner of filling a vacancy does not vest the right to fill such vacancies. Prescribing the manner of filling an office is a legislative act. The law points out how and by whom an office or a vacancy in an office shall be filled, and the right to make laws is vested in the General Assembly. When the General Assembly has passed the law prescribing the manner of filling the vacancy, then the power vested in it as a

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legislative body ends. The power to execute the law rests elsewhere, unless it is expressly given to the legislative department.

It is declared by section 1, article 3, that the Legislature shall not exercise any functions except legislative, unless it is expressly so provided in the Constitution. It is to be presumed that the words used in the Constitution were used in their ordinary sense, and in interpreting the language of the Constitution each word shall be given its well defined definition and meaning. The word "express," as defined by Worcester, means: "Given in direct terms; not implied; not dubious; clear; definite; explicit; plain; manifest." The word "expressly" is defined by Worcester to mean: "In direct terms; plainly." Bouvier's law dictionary gives the definition of "express" as: "Stated or declared, as opposed to implied. That which is made known and not left to implication." "Expressly" is defined in the Encyclopædic Dictionary to mean: "In an express, clear or distinct manner; plainly; directly; pointedly; in direct terms." It certainly can not be contended that the power to elect or appoint county, township or town officers is given to the General Assembly in direct, definite, explicit, plain or manifest terms by any of the language used in either of the sections of article 6. If it can be held that such power be granted at all, it must be by implication from the words "in such manner as may be prescribed by law," that is, the giving the Legislature power to prescribe the manner carries with it the power to do the act—to fill the office. If such power could be fairly inferred or implied from the language used, yet it would not grant the power, for the reason that it is declared in section 1, article 3, that no implied power in excess of legislative shall be exercised, except such as is expressly, plainly, certainly or directly granted.

The Supreme Court of Ohio held, in the case of *State v. Kennon*, 7 Ohio St. 546, that the Constitution of Ohio, providing that "the directors of the penitentiary shall be ap-

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pointed or elected in such manner as the General Assembly may direct," did not give to the General Assembly power to make the appointment of directors. In speaking of the right claimed by the Legislature to appoint, the court says: "To make good this claim, it must be made to appear that the power to direct the 'manner,' the mode, the way in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical, or equivalent to each other, is too clear for argument, and almost too clear to admit of illustration. To prescribe the manner of election or appointment to an office is an ordinary legislative function. To make an appointment to office, is an administrative function."

Under our system of government, divided into three separate, distinct, co-ordinate branches, the legislative and judicial departments may exercise appointing power to offices peculiarly related to and connected with the exercise of their constitutional functions, and to maintain their independent existence; that is to say, the General Assembly may elect or appoint the officers of their respective branches and relating to their department of the government; courts may appoint administrators, guardians, master commissioners and such officers as are necessary to the free and independent exercise of power conferred by the Constitution, but the appointment of officers generally is naturally and properly an executive function. *Taylor v. Com.*, 3 J. J. M. 401; *Letter of Thomas Jefferson to S. Kercheval*, dated November 21st, 1816; *Marbury v. Madison*, 1 Cranch, 137; *Wood v. U. S.*, 15 Ct. of Cl. 151; *Perkins v. U. S.*, 20 Ct. of Cl. 438; *U. S. v. Perkins*, 116 U. S. 483; *Ohio v. Covington*, 29 Ohio St. 102; *Achley's Case*, 4 Abb. Pr. Rep. 35; *State v. Kennon*, 7 Ohio St. 546; *People v. McKee*, 68 N. C. 429; *State v. Tate*, 68 N. C. 546; *Pomeroy Const. Law*, section 643; *Federalist Letters*, 47 and 48.

The only remaining provision which we think it can possibly be claimed granted any power to the General Assem-

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bly to fill offices, is section 1, article 15, which provides: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." This is the same language used in the section we have heretofore referred to. Town officers were at that time elected by the people of the respective towns of the State, in the exercise of the right of local self-government. As applied to town officers, the language used certainly can not be construed as an intention on the part of the people to surrender their right of local self-government, and as granting the power to the General Assembly to elect or appoint local officers in the various towns of the State. Indeed, to place any other construction than we have upon such language, and hold that the General Assembly has the right to appoint town officers for one or two cities or towns of the State, to take charge of and administer their local affairs, as it seeks to do by the act under consideration, would be granting to the General Assembly the power to elect every county, township and town officer not expressly named and the manner of their election pointed out by the Constitution.

Section 3, article 6, provides that "Such other county and township officers, as may be necessary, shall be elected or appointed in such manner as may be prescribed by law." We have not placed any new or forced construction on the Constitution, nor have we advanced any new or strange theory of our State government, but are adhering to the well recognized theory of our government, and walking in the same beaten path that all have walked since the adoption of the Constitution. Since its adoption, and before, the people of the counties, townships, cities and towns have exercised the exclusive right of selecting and choosing their local officers, the Legislature has recognized their right to do so, and prescribed the manner of election, and now for the first time the General Assembly has claimed to itself the power of selecting such officers for two cities of the State.

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We have quoted and considered all the provisions of the Constitution granting power to the legislative department of the State government, and are clearly of the opinion that the Legislature is granted no such power as is exercised in the passage of this act, in providing for the election of and in electing the officers contemplated by the act; but, indeed, it is not earnestly contended by counsel that any such power is by express terms granted, but it is contended, as stated in the outset, that, by the creation of the departments of government by the Constitution, all power vested in the Legislature that was not, by express terms, reserved to the people or granted to the executive or judicial departments, and that the burden rests on him who asserts that a law is unconstitutional, to point out the provisions of the Constitution that forbid its passage.

Upon the question as to the constitutionality of statutes, Judge Cooley says: "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it can not be necessary to prohibit its being done." Cooley Const. Lim. (5th ed.), p. 208.

In considering the question of the right of the Legislature of the State of Michigan to appoint municipal officers, the Supreme Court of Michigan, in the case of *People v. Hurlbut*, 24 Mich. 44, 96 (9 Am. Rep. 103), in an opinion written by that eminent jurist, Justice COOLEY says: "Our Constitution assumes the existence of counties and townships, and evidently contemplates that the State shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the State shall have county or township organizations. It names certain officers

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which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the Legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the State might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent, and for any period of time the State might choose. The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several State Constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too

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plain for serious controversy. The implied restrictions upon the power of the Legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations." *People v. Albertson*, 55 N. Y. 50; *People v. Mayor*, 51 Ill. 17; Cooley Const. Lim. (5th ed.) 208; *Id.*, 209, 282, 225; Pomeroy Const. Law (9th ed.), chapter on Centralization and Local Self-Government, section 151, *et seq.*; 1 Dillon Munic. Corp. (3d ed.), section 9.

The conclusion we unhesitatingly reach is, that the right of local self-government in towns and cities of this State is vested in the people of the respective municipalities, and that the General Assembly has no right to appoint the officers to manage and administer municipal affairs; that the right of the General Assembly ends with the enactment of laws prescribing the manner of selection and the duties of the officers. There is a class of officers whose duties are general, but who act for the State in localities, which the General Assemblies of some States have exercised the right to appoint, and courts have upheld the right to make such appointments; but this class of officers are constabulary or peace officers, those whose duties are to preserve the peace. In this case we do not deem it necessary to consider that portion of the law relating to peace officers, or to determine the right of the General Assembly to appoint officers of that character under our Constitution. The right of the State, however, to exercise such power must rest on the theory that the State owes protection to its citizens wherever they may be within the borders of the State, alike upon highways in a sparsely

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populated territory as upon the streets of a densely populated city, and to discharge such obligation has the right to exercise control over the peace officers of the State; but the law in question provides for taking exclusive control of the fire department within certain cities, appointing the officers and controlling the department, and compelling the cities to pay all of the expenses. Although some authority may be found to support such right on the part of the Legislature, we think it is in conflict with our system of State government and derogatory to the rights of the people.

There are many things which are included within the definition of police power which are purely local, and of which the State has only an indirect interest, and which, under our State government, are exclusively within the control of local authorities. Such we regard the fire department and the control of the streets, sidewalks, sewers and water-works of a city or town. In speaking of such matters as are purely local, in the case of *People v. Hurlbut*, *supra*, Justice COOLEY says: "In the case before us, the offices in question involve the custody, care, management and control of the pavements, sewers, water-works and public buildings of the city, and the duties are purely local. The State at large may have an indirect interest in an intelligent, honest, upright and prompt discharge of them; but this is on commercial and neighborhood grounds, rather than any political, and it is not much greater or more direct than if the State line excluded the city."

In New York, commissioners were appointed in 1876 to devise a plan for the government of cities in the State of New York. In their report, they say of the assumption by the Legislature of the direct control of local affairs: "This legislative intervention has necessarily involved a disregard of one of the most fundamental principles of republican government (the self-government of municipalities). The representatives elected to the central (State) Legislature have not the requisite time to direct the local affairs of the mu-

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nicipalities. They have not the requisite knowledge of details. When a local bill is under consideration in the Legislature, its care and explanation are left exclusively to the representatives of the locality to which it is applicable ; and sometimes by express, more often by a tacit understanding, local bills are 'log-rolled' through the houses. Thus legislative duty is delegated to the local representatives, who, acting frequently in combination with the sinister elements of their constituency, shift the responsibility for wrong-doing from themselves to the Legislature. But what is even more important, the general representatives have not that sense of personal interest and personal responsibility to their constituents which are indispensable to the intelligent administration of local affairs. And yet the judgment of the local governing bodies in various parts of the State, and the wishes of their constituents, are liable to be overruled by the votes of legislators living at a distance of a hundred miles." 1 Bryce American Commonwealth, pp. 611, 612. In speaking of this committee and its report, Mr. Bryce says: "The commission, of which Mr. W. M. Evarts (now Senator from New York) was chairman, included some of the ablest men in the State, and its report, presented 6th March, 1877, may be said to have become classical." Vol. 1, p. 609.

The learned gentlemen composing that committee expressed their views as stated in the report, after having carefully studied the question with a view of devising the best plan of city government.

Is it fair to presume that the people of this State, in the adoption of the Constitution, did not intend to surrender the right of self-government in so far as to allow the Legislature to even take charge of the fire department of every town and city of the State, and to appoint officers to take charge of and manage the affairs of such department, and limit the legislative body to sixty-one days in every two years. We do not believe that such was the intention of the people at that time, nor do we believe that such is their understanding of the

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power of the Legislature at the present time ; nor is there any word or sentence in the Constitution granting such power.

It is contended that the preservation of property against loss by fire clearly falls within the scope of the police power to be exercised by the State ; that the supreme power of destroying buildings to prevent the spreading of fires is one of the illustrations that city officers are not possessed of these powers, as city officers, but because they are, to that extent, State officers, with strictly State powers conferred on them.

Mr. Hare, in his American Constitutional Law, vol. 2, pp. 762, 763, states the law in regard to the right to tear down buildings to prevent the spread of a conflagration, as follows : " The acts which authorize sheriffs, magistrates, or other officers to destroy infected clothing or to tear down buildings in order to prevent the spread of a conflagration, rested on the inherent right of self-defence, and simply regulated a power which might be exercised on the ground of necessity though it were not conferred in terms."

" It is enough," said COMSTOCK, J., in *Wynehamer v. People*, 13 N. Y. 378, " to say of such statutes, that they are founded upon and are mere regulations of the common law right of any person to destroy property in a case of immediate and overwhelming necessity to prevent the ravages of fire or pestilence. * * * Statutes of this description merely appoint a municipal agent to judge of the emergency, and direct the performance of acts which any individual might do at his peril without any statute at all." Hence one who acts in cases of the above description without being authorized thereto by a statute, and one who relies upon the authority of such a statute as a justification, stand upon the same basis.

In the case of *Wynehamer v. People*, *supra*, at p. 439, it was said by SELDEN, J.: " It is said that the Legislature has the conceded power to authorize the destruction of private property, in certain cases, for the protection of great public interests ; as, for instance, the blowing up of buildings

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during fires and the destroying of infected articles in times of pestilence, and that the Legislature is necessarily the sole judge of the public exigency which may call for the exercise of this power. The answer is, that the Legislature does not in these cases authorize the destruction of property; it simply regulates that inherent and inalienable right which exists in every individual to protect his life and his property from immediate destruction. This is a right which individuals do not surrender when they enter into the social state, and which can not be taken from them. The acts of the Legislature in such cases do not confer any right of destruction which would not exist independent of them, but they aim to introduce some method with the exercise of the right." See, also, *Russell v. Mayor, etc.*, 2 Denio, 461.

The doctrine is well stated in the authorities above cited. The right is inherent in every individual to protect his own property from destruction by fire. We certainly think it can not be contended that, if the individual should provide himself with fire-engines and appliances for the extinguishment of fires and the suppression of conflagrations, and erect buildings for storing and keeping such appliances for the protection of his own property, the State, by its General Assembly, could appoint an agent to protect his property from destruction by fire and compel him to turn his appliances, thus provided, over to such agent, and require the individual to pay the expense of the service. What greater reason exists for declaring that the people of a municipality, who have collectively supplied themselves with such means of extinguishing fires and preventing conflagrations, at a large expense, shall turn such property over to officers selected by the General Assembly and pay the expense of keeping up a fire department in the selection of which they are not allowed to participate? The State has no interest in the property within a city or town, except such indirect interest as it has in the property of all its citizens.

Since the organization of the State government, towns and

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cities have universally exercised the exclusive right of self-government in the control and repair of streets, alleys and sidewalks, in the construction of sewers and water-works, and in the organization and control of fire departments. They have been held liable for damages resulting by reason of defects in sidewalks, streets and sewers. All property within the corporate limits is liable for the payment of debts created by the municipality in providing these necessities for the people of the municipality, and in which the people, other than those residing within the particular town or city, are in no way directly interested. After the exercise of these rights for nearly thirty years, under the present Constitution, the General Assembly submitted to the people, and the people adopted, an amendment to the Constitution limiting the amount of indebtedness to be incurred by municipal corporations, expressly recognizing the right of local self-government by cities and towns to incur indebtedness in the management of their municipal affairs; and now, by this act, the Legislature of the State seeks to create a commission, composed of three persons appointed by it, to take charge of the police and fire departments of two cities, without the powers of said commissioners being limited in the employment of firemen or the incurring of liability to be paid by the city.

The General Assembly has no power except such as was granted by the Constitution. Judge Cooley, in his work on Constitutional Limitations (5th ed.), p. 47, says: "In considering State Constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. 'What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and

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political freedom ; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of the laws, rights, habits, and modes of thought.' ” Again he says, on same page : “ ‘A written Constitution is in every instance a limitation upon the powers of government in the hands of agents ; for there never was a written republican Constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition.’ ”

We hold that the right to provide and maintain a fire department in a town or city is one of the rights which are vested in the people of municipalities, is to be exercised by them, and is not subject to legislative interference, except in so far as that body may prescribe rules to aid the people of the municipality in the exercise of such right ; that such right is an element of local self-government which was vested in the people of the municipalities at the time of the adoption of the Constitution, and was not parted with by them ; that so much of the statute under consideration as relates to the management and control of the fire departments of cities, is unconstitutional and void.

Having reached the conclusion that the provisions of the statute relating to the management and control of the fire departments of cities by commissioners appointed by the General Assembly are invalid, the next question to be determined is, whether the provisions of the statute relating to the fire department and police department are so intermingled with and dependent on each other as that the whole law must fall ?

The rule for the determination of this question is, that if the provisions of the act are so mutually connected with and dependent on each other as conditions, considerations or

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compensations for each other as to warrant the belief that the Legislature intended them as a whole, and, if all could not be carried into effect, the Legislature would not have passed the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them. This is the rule universally held by the courts in determining the validity of a statute. *Myers v. Berlandi* (Minn.), 40 N. W. Rep. 513; *O'Brien v. Krenz*, 36 Minn. 136.

In the case of *Burkholtz v. State*, 16 Lea (Tenn.), 71, it is held: "When only a part of a statute is void, and the residue so dependent and connected with the void part that it can not be presumed that the Legislature would have passed the one without the other, then both are void."

In the statute in question the title to the act declares it to be "An act providing for a board of metropolitan police and fire department." The name given to the board is a "Board of Metropolitan Police and Fire Department." It gives the board like control of such department. It requires all the property, real and personal, belonging to such department, together with the books and records, to be turned over to such board. It gives the board full control, and imposes upon it the duty to immediately organize both departments. It gives the board like power to remove and appoint the force in both departments. It provides that such force shall be selected equally from the two leading political parties in such cities. The oath the commissioners take relates to their duties in both departments. It fixes a salary for each commissioner, to be paid to him monthly out of the treasury of such city, which is in payment for his services rendered in the discharge of his duties in relation to the fire department as well as the police department. It requires each of the commissioners to give a bond for the faithful discharge of his duties, which applies to the duties in both departments. They are to appoint a secretary and property clerk, who is to give a bond and receive all property belonging to both departments. It

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requires a joint auditing of all the expenditures in both departments, to be certified to by the president and secretary of said board, and an appropriation by the city to pay the same monthly. In short, it is a joint act in relation to these two departments, and the only separation of one from the other is merely in the designation of officers and fixing their salaries, and use of terms which would apply to but one department.

In determining whether any part of this statute is valid, while the other is invalid, it is proper to consider other statutes and laws in force at the time of its passage, and the defects sought to be remedied and the purpose and object of its passage. In doing so, we find there is another statute upon the statute books of the State creating a metropolitan police board for the same cities to which this law applies, composed of three commissioners, which is in full force, and similar, indeed almost identical in terms, to the provisions of this act relating to the police department, except that the salary of the commissioners shall not exceed \$400, and the salary of the secretary and property clerk shall not exceed \$1,000. It is evident that the sole purpose and object of this enactment was to enable the State, by its legislative department, to take exclusive charge and control of the fire department of the cities within the provisions of this law, and to unite under the same management the constabulary or police force and the fire department. The services of the commissioners would be greater and the duties much more arduous in the management of both departments than only one, and it is evident that the General Assembly, in fixing the salary of the commissioners in this act, took into consideration the duties to be performed in both departments, and named an amount corresponding, in its judgment, to the whole duties to be performed by them. The provisions of this act, relating to these departments, being so intermingled, mutually connected with and dependent upon each other, and there being another statute of like tenor and effect gov-

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erning the management of the police department, it is evident that the Legislature would not have passed the part of the act relating to the police department in the manner and with the provisions that it would contain if that portion relating to the fire department were stricken out, and that such law can not be enforced, as it was intended by the Legislature, with that part relating to the fire department eliminated therefrom. We, therefore, hold that the whole act must fall by reason of its being in opposition to the fundamental principles of our State government, and against the spirit of our Constitution, and that the Legislature had no power to pass such an enactment.

The act provides that said commissioners shall have resided in such cities for at least five years next preceding their election. It also provides that the captains, sergeants, detectives and other officers and patrolmen, and the firemen and employees of the fire department, shall be selected equally from the two leading political parties of said cities.

Section 23, article 1 of the Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

It was the evident intention of the Legislature that the provision as to the residence of the commissioners should apply to all the commissioners appointed at any time under the act. This is clearly in violation of the Constitution. If the Legislature can require a residence of five years as a qualification for office, it can require a residence of any other number of years; if it can make the fact of residence a qualification for office, it can make age a qualification, and may therefore fix the qualification for a statutory office above a certain age or under a certain age, or between certain ages. It is clearly class legislation, and granting to certain citizens privileges not equally belonging to all.

Section 8 of the act provides: "The officers and members of such metropolitan police force shall possess all the com-

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mon law and statutory powers of constables, except for the service of process." And section 9 gives to them exclusive power to serve process issued from certain courts within the city, and they are, by virtue of such act, public officers, as are the commissioners provided for by said act, and the provision of the law limiting the right to hold such police offices to persons belonging to one of the two leading political parties within such cities is invalid, as it grants to a class of citizens belonging to two leading parties privileges and immunities, viz., the right to hold such police offices, that it does not confer on all citizens. In other words, it exacts of a citizen that he believe in a certain political faith or creed to entitle him to hold such offices. If the right to hold such offices can be limited to persons belonging to, and identified with, either one of two parties, it can be limited to persons belonging to one party, which would exclude more than one-half of the voters of such cities from acting as police officers. The existence of various political parties and the manner in which officers are selected, are matters of which courts take judicial knowledge. The right to hold public office is a right which belongs alike to every voter residing within the political division of the State from which such officer is chosen, unless otherwise provided by the Constitution.

It is suggested that we have many other laws which require a residence or property qualification to enable the person to occupy certain positions and perform certain duties, such as the law providing that if a voter be challenged a resident freeholder of the precinct must make an affidavit to procure the challenged voter the right to vote; the divorce act, requiring the residence to be proven by two freeholders; that jury commissioners and judges of elections must be freeholders.

None of these are public officers, in a strict sense, and the question as to the validity of such laws differs very materially from the one under consideration. The Legislature has the right to prescribe what shall be competent evidence

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to establish particular facts, and, in the case of judges of elections, they are mere temporary agents, selected in a particular way, to guard and protect the purity of the ballot; and the law prescribing the mode of selecting jurors is to aid courts in guarding the sanctity of the jury-box. Such persons do not exercise rights and privileges to which every person is entitled, and are not strictly officers, but agencies used by the officers whom the people have selected to carry out the will of the people. The Legislature having the right to pass laws governing elections and the manner of selecting juries, it has the right to prescribe proper safe-guards for the execution of the same.

Having held that the provisions of the act relating to the fire and police departments are so interwoven, connected with and dependent upon each other that the whole act must fall, it is not necessary to determine whether the provisions of the act relating to the selection and the qualifications of the officers would invalidate the whole act.

In reaching the conclusion we have as to the unconstitutionality of this act, we have not been unmindful of the rule governing courts in passing upon the constitutionality of a statute. This prerogative should not be exercised by courts in doubtful cases, but when an act is plainly in violation of the fundamental principles of government and the spirit of the Constitution, and seeks to take from the people the inherent and inalienable rights vested in them, and to deprive them of local self-government, courts should not hesitate to declare such a law invalid.

We therefore hold that the entire statute is unconstitutional and void, and that there is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

MITCHELL, J., dissents, for the reasons given in his opinion in the case of *State, ex rel., v. Denny, ante*, pp. 382, 411.

Filed April 24, 1889.

Butler et al. v. Roberts.

No. 13,531.

BUTLER ET AL. v. ROBERTS.

EVIDENCE.—*Long-Hand Manuscript of.*—*Bill of Exceptions.*—*Practice.*—In order to make the official reporter's long-hand manuscript of the evidence a part of the record, it must be incorporated in a formal bill of exceptions.

INSTRUCTIONS TO JURY.—*Making Part of Record.*—*Bill of Exceptions.*—*Practice.*—Instructions which are not brought into the record by a bill of exceptions, or which are not signed by the judge and filed as a part of the record, will not be considered on appeal.

From the Newton Circuit Court.

J. T. Saunderson and *F. A. Comparet*, for appellants.

E. P. Hammond and *W. Cummings*, for appellee.

MITCHELL, J.—Roberts recovered a judgment for \$200 damages, in the Newton Circuit Court, against Henry and West Butler, for an alleged unlawful assault and battery committed by the defendants upon the person of the plaintiff.

The appellants ask a reversal on the ground that the verdict is not sustained by the evidence, and because of alleged error committed by the court in giving and refusing certain instructions.

It would be sufficient to say that the record presents no question requiring examination, because the long-hand manuscript of the evidence, as copied by the official reporter, is not incorporated in a bill of exceptions. The supposition seems to have prevailed that the manuscript itself, by being styled a bill of exceptions containing all the evidence given in the cause, with the signature of the judge attached on a given date, constituted a sufficient bill, notwithstanding the absence of any preface or formal ending characteristic of a bill of exceptions. The statute affords a convenient and inexpensive method of certifying up the long-hand manuscript

118	481
122	292
118	481
127	563
118	481
129	470
129	562
118	481
130	390
118	481
156	825
118	481
163	453
118	481
164	438
118	481
165	242

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of the evidence, but it must be incorporated in a formal bill of exceptions. A paper does not constitute a bill of exceptions by simply being so named. *Marshall v. State, ex rel.*, 107 Ind. 173; *Wagoner v. Wilson*, 108 Ind. 210. Notwithstanding the informality of the bill of exceptions, we have examined what purports to be the evidence, and find that the testimony of the plaintiff himself, and that of other witnesses who testified in his behalf, fully sustains the verdict.

The instructions are copied into the transcript by the clerk, but they are not brought into the record by a bill of exceptions, nor is there anything in the transcript to show that they were signed by the judge and filed as a part of the record. *Landwerlen v. Wheeler*, 106 Ind. 523; *Fort-Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100.

No question is, therefore, presented involving the propriety of the instructions given or refused.

The judgment is affirmed, with costs, and five per cent. damages:

Filed April 25, 1889.

118	488
121	435
118	482
124	104
118	482
128	192
118	482
137	25
118	482
141	14
118	482
156	605
118	482
165	96

No. 14,592.

CONWAY v. THE STATE.

CRIMINAL LAW.—Witness.—Accomplice.—May Testify for State.—One jointly indicted with another as an accomplice in crime is a competent witness for the prosecution upon the trial of the latter, if he consents to testify. **SAME.—Examination of Witness.—Objection to Question.—Practice.**—An objection to a competent question propounded to a witness does not reach beyond the question to an incompetent answer that may be given in response thereto. **SAME.—Evidence.—Conversation.**—A conversation in the presence of an ac-

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cused, and in part of which he participated, is admissible in evidence as a whole.

SAME.—*Statements Tending to Charge Crime.—Silence of Accused.*—Where a conversation involving statements tending to charge the accused with a crime takes place in his presence, and he remains silent, when the circumstances are such as to make it natural for him to speak, such conversation is competent evidence.

SAME.—*Determining Competency of Evidence.*—In determining the competency of particular testimony the court is not confined to the testimony of one witness, but may look to other evidence, whether direct or circumstantial.

SAME.—*Admission by Silence.*—A conversation in the presence of the accused, between his companion and another, in which the crime is spoken of and information that may enable the accused to escape is sought, is competent as tending to show an admission by silence.

SAME.—*Hostile Witness.—Examination of.*—The method of examining a hostile witness is a matter almost entirely within the discretion of the trial court, and the Supreme Court will not interfere unless a clear abuse of discretion, leading to manifest injustice, is shown.

SAME.—*Suggestive Questions.—Pressing Witness.*—Where a witness betrays his hostility to the State, it is proper to permit the prosecution to ask him suggestive questions and to press him with questions designed to compel him to reveal what he knows, even though such questions embarrass him and "place him in an awkward position."

SAME.—*Contradiction of Witness by Evidence of Different Statements.*—Where a witness produced by the State makes statements prejudicial to the prosecution, the State may, under section 507, R. S. 1881—which, by force of section 1796, R. S. 1881, governs in criminal prosecutions—contradict him by evidence of different statements made out of court.

SAME.—*Influencing Witness.—Offering to Give Money.*—Evidence of a conversation between the accused and another, in which the former offered to pay the latter "three hundred dollars if he would say that he had done the cutting in self-defence," is competent as an admission, and as showing an attempt to influence a witness to give favorable testimony.

SAME.—*Expert Witness.—Cross-Examination of.—Hypothetical Question.*—It is proper for counsel for the State, on the cross-examination of an expert witness, to assume facts, within the range of the evidence, which they believe proved, and on this assumption ask for an opinion from the witness.

SAME.—*Criminal Responsibility.—Weakness of Intellect.*—Mere weakness of intellect will not shield one who commits a crime; if the will power is not overthrown by disease, and there is sufficient mental capacity to know right from wrong, there is criminal responsibility.

From the Delaware Circuit Court.

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J. Brown, W. A. Brown and G. H. Koons, for appellant. L. T. Michener, Attorney General, J. H. Gillett and W. A. Kittinger, for the State.

ELLIOTT, C. J.—The appellant prosecutes this appeal from a judgment sentencing him to prison for the crime of manslaughter.

He was jointly indicted with one George Melrose, and the latter was permitted to testify as a witness. In this there was no error. At common law the weight of modern authority is, that an accomplice may testify for the prosecution, if he consents to do so. A recent writer says: "A few cases decide that an accomplice who has not been indicted is competent; but the great weight of authority raises no distinction between accomplices who have been, and those who have not been indicted." Law of Witnesses, section 21. But our statute dispels whatever doubt may have existed before its enactment. It radically changes the old and original common law rule and establishes an essentially different policy. It permits the accused to be a witness in his own behalf. It declares that the conviction of an infamous crime shall not disqualify a witness. It goes further, for it declares that in criminal prosecutions "The following persons are competent witnesses: All persons who are competent to testify in civil actions. * * Accomplices, when they consent to testify." R. S. 1881, section 1798. In civil actions parties may be witnesses, and no witness is disqualified because he conspired with another to commit a tort or assisted him in its commission, and it seems difficult to perceive why, even if the first provision quoted stood alone, an accomplice would not be competent. But it is not necessary to act upon that provision alone, for it must be taken in connection with the other that we have quoted, and, thus taken, no doubt can exist as to the meaning of the statute. The statute declares that all accomplices may testify. It imposes no limitations and creates no exceptions. The courts have no authority to

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do either. The question, however, is not a new one in this court, for it has always been held that an accomplice is a competent witness. *Johnson v. State*, 2 Ind. 652; *Stocking v. State*, 7 Ind. 326; *Ulmer v. State*, 14 Ind. 52; *Johnson v. State*, 65 Ind. 269; *Ayers v. State*, 88 Ind. 275. In *Ulmer v. State*, *supra*, and in *Johnson v. State*, *supra*, the witness was jointly indicted with the accused. In *Stocking v. State*, *supra*, the court said of the testimony of an accomplice that: "It is very true that the evidence of persons standing in such a relation to each other, should be carefully scrutinized by the court and jury. Yet to exclude it altogether, would often exclude the only means of disclosing guilt. For this reason, the revised statutes abolished the distinction which the pronouncing of judgment formerly made in regard to a witness that was infamous. 2 R. S. (1852), p. 80, and section 243, p. 83. What before affected his competence, under that enactment goes only to his credibility."

Alexander Davis, a witness for the State, was asked to detail a conversation which took place, shortly after the fatal wound was inflicted, at the house of Rybolt between himself, Elmer Conway and Charles Conway, the appellant. The question was competent, and even if the answer had been incompetent, the objection to the question could not be considered as extending to the answer. An objection to a question does not reach further than the question. *Gould v. Day*, 94 U. S. 405; *Barnes v. Ingalls*, 39 Ala. 193. But we think the answer was not objectionable. The accused was present, and we can not say that he was not within hearing distance, or that he did not hear what was said. It is enough, to render testimony of a conversation competent, if the witnesses detail statements tending to charge the accused with the crime, and there are circumstances making it natural for him to speak, and none requiring him to remain silent. *Puett v. Beard*, 86 Ind. 104; *Johnson v. Holliday*, 79 Ind. 151; *Blessing v. Dodds*, 53 Ind. 95; *Pierce v. Goldsberry*, 35 Ind. 317. An admission by silence may be competent, and yet

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not be of such a character as to be entitled to much weight; still, if competent, it must be admitted. *Pedigo v. Grimes*, 113 Ind. 148. In the case before us, the accused, it is inferable from the record, participated in part at least of the conversation, and as part of the conversation was admissible, the whole was competent. In deciding that testimony is competent, the court is not confined to the testimony of one witness, but may look to other evidence, whether direct or circumstantial, to determine the competency of the particular testimony.

What we have said as to the testimony of Davis applies to that of the witness Butler, for the accused not only heard the conversation between Butler and Elmer Conway, but participated in it. The testimony of Butler was competent, not solely because it tended to contradict Elmer Conway, but for the reason that, as original evidence, it tended to establish a criminating admission on the part of the appellant. The testimony of Davis and of Butler was competent, even if the accused had taken no part in it. He had joined Elmer Conway at a point not far from the place where the wound was inflicted. Elmer had witnessed the rencounter, he was speaking of it to Davis, he was in company with the accused, and he was seeking to obtain information that might enable the accused to escape. Under these circumstances the silence of the accused, had he been silent, would have entitled the testimony to admission. Of course the declarations of Elmer Conway did not conclude the appellant, but that does not determine the question of their competency. There is some conflict in the cases as to the effect of silence where criminating statements are made, but even under the decisions, such as *Drury v. Hervey*, 126 Mass. 519, and *Com. v. McDermott*, 123 Mass. 440, which much restrict the rule as elsewhere enforced, the testimony here given was competent as a tacit admission, even if it be conceded that the accused took no part in the conversation. But this concession the record forbids.

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Questions intended, in good faith, to refresh the memory of a witness by directing his attention to persons and occurrences, are competent even where the witness is friendly to the party examining him. Dr. Wharton says: "Nor does the rule preclude a party from refreshing the memory even of friendly witnesses when the tendency of the question is to lead the witness to the topic rather than to exhibit the topic to the witness." 1 Wharton Evidence (3d ed.), section 501. If this is the rule where the witness is favorably disposed to the examiner, much the more reason is there for it where the witness is unfriendly. It is, indeed, no more than fair that any witness, friendly or hostile, should have his memory aided by the mention of time, place and circumstances, for this mention might often prevent mistakes and keep a witness from departing from the truth. To be sure, it would be subversive of principle to permit counsel, under the guise of refreshing the memory of a witness, to suggest the desired answers to a willing or friendly witness; but where the witness is a hostile one, as was Elmer Conway, there is no fear of evil result from suggestive questions.

A hostile witness may, as the authorities all agree, be treated in a very different manner from a friendly one. The method of examination is almost entirely a matter within the discretion of the trial court, and the appellate court will not interfere unless there was a clear abuse of discretion, leading to manifest injustice. Law of Witnesses, section 242. The complaint of counsel that the questions propounded to Elmer Conway were such as to "place the witness in an awkward position," and to embarrass him, even if well founded, would not supply a sufficient reason for a reversal. We can not, however, say that the complaint of counsel is well founded in fact, for, after carefully studying the testimony, we are satisfied that the questions sought only the truth, and that they were not asked for the sole purpose of disgracing or embarrassing the witness, although some of the answers may have placed him in an unenviable position. It was en-

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tirely proper for the examining counsel to ascertain, if he could, what Elmer Conway actually saw and heard, and to discover and develop his opportunities for acquiring knowledge, and his inclination or disinclination to communicate it.

Elmer Conway was the cousin and the friend of the accused. He was present at the rencounter, and interfered to protect his cousin. He rode with him part of the way to the place where the homicide was committed. He was in company with him shortly after the homicide, at a place not far distant from the place where it occurred, and exhibited a will and purpose to assist him in his flight. His answers to questions during his examination betrayed his hostility to the State and his friendliness to the defendant. He was in every sense an adverse witness, and the court did not err in permitting the prosecutor to ask him suggestive questions, nor in allowing counsel to press him with questions designed to compel him to reveal what he knew.

The provisions of section 507, R. S. 1881, are as follows: "The party producing a witness shall not be allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him, or in case of manifest surprise, when the party shall have this right; but he may, in all cases, contradict him by other evidence, and by showing that he has made statements different from his present testimony." By force of section 1796, R. S. 1881, these provisions govern in criminal prosecutions. Our decisions have repeatedly enforced these statutory provisions, and have declared that a party may contradict his own witness by evidence of statements made out of court. The only limitation is that the witness shall not be contradicted unless he has given testimony prejudicial to the party by whom he was called. *Judy v. Johnson*, 16 Ind. 371; *Hill v. Goode*, 18 Ind. 207; *Hull v. State, ex rel.*, 93 Ind. 128. In *Hill v. Goode, supra*, the court said that two debatable questions are settled by the statute, and that one of them is: "That a

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party may prove previous statements of his own witness contradictory to those sworn to on the given trial." Other courts have so decided. *Blackburn v. Com.*, 12 Bush (Ky.), 181; *Champ v. Com.*, 2 Metcf. (Ky.) 17; *Dear v. Knight*, 1 Fost. & F. 433; *Hemingway v. Garth*, 51 Ala. 530; *Com. v. Donahoe*, 133 Mass. 407; *White v. State*, 10 Texas App. 381. In this case the witness did make statements prejudicial to the State, and the case is, therefore, brought fully within the rule.

Proof that a witness did make statements different from those made in court ought not to be accepted as proof of the truth of the matters contained in those statements, for they reach no further in any case than an impeachment of the witness; but, although they can have no greater effect, still they are competent. The purpose of our statute is to prevent a party from being concluded by the testimony of an adverse witness. Like the act of Parliament of Great Britain, our statute has altered a rule of evidence—a rule, it may be said, in passing, which never received the sanction of philosophical writers—in order to enable the courts to the better accomplish the purpose for which they are organized, that of discovering truth and administering justice. The wisdom of the statutory rule is illustrated by this case. The prosecutor called a witness who was present when the fatal wound was inflicted, and who had stated to others that it was the accused who gave the wound; but, on the stand, he testified that it was inflicted by another. To hold the State concluded by the statement of the witness made on the stand would check progress toward the discovery of the truth, and make way for a guilty man to escape, where, if the truth were exhibited, it would condemn him. But we need not attempt to vindicate the wisdom of the statute, for we should be compelled to accept the law as it is written, even if we could not approve its policy.

The State was permitted to prove by a witness that he

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heard a conversation between the appellant and George Melrose, in which the former offered to pay the latter "three hundred dollars if he would say that he had done the cutting in self-defence, and then he would help him all he could." There was no error in admitting this evidence. It was competent as an admission and as evidence of an attempt to influence a witness to give favorable testimony.

It was proper for the counsel of the State, on the cross-examination of an expert witness of the appellant, to assume facts, within the range of the evidence, which they believed proved, and on this assumption ask for an opinion from the witness. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409, and cases cited; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544, op. p. 554.

It must be regarded as settled in this State—and so it is generally held elsewhere—that if the will power is not overthrown by disease, and there is sufficient mental capacity to know right from wrong, there is criminal responsibility. Mere weakness of intellect will not shield one who commits a crime. *Goodwin v. State*, 96 Ind. 551; *Wartena v. State*, 105 Ind. 445; *Warner v. State*, 114 Ind. 137.

There was no plea of insanity, and it may, perhaps, be doubted whether any evidence on that question was admissible, but the appellant, having adduced it, is in no situation to complain that the State answered it. But we need not decide what is the effect to be given to section 1764, R. S. 1881, for, conceding that evidence of insanity is competent without a plea, still no error against the appellant was committed in receiving evidence or in giving instructions. The instructions of the court do not assume that the accused was of sound mind and of weak intellect, although they do inform the jury that no plea of insanity was interposed. The statement of a fact established by the record certainly furnishes no reason for reversing the judgment. Nor was there any error prejudicial to the appellant in informing the jury that the evidence on the subject of mental capacity might be

The State v. Fields.

considered by them for the purpose "of determining the mental status and capacity of the defendant." The evidence gives full support to the verdict.

Judgment affirmed.

Filed April 25, 1889.

No. 13,690.

THE STATE v. FIELDS.

CRIMINAL LAW.—*False Pretences.*—*Felonious Intent.*—To sustain a charge of obtaining goods by false pretences a felonious intent must be shown.

From the Marshall Circuit Court.

C. P. Drummond, Prosecuting Attorney, for the State.

COFFEY, J.—This was a prosecution by the State against the appellee, by affidavit and information, for obtaining goods by false pretences. On motion of the appellee, the affidavit and information were quashed by the court below, and the State, by its prosecuting attorney, excepted.

The affidavit and information are quite lengthy, and no good purpose would be served by setting them out in full. They detail with great minuteness the negotiations between the affiant, John Miller, and the appellee, Theodore Fields, which finally resulted in the exchange of a thirty-dollar horse for a four-dollar watch. That the affiant was the loser by the transaction is not to be doubted, but, we think, the facts set out fall far short of constituting a public offence. They may be sufficient to give the affiant a cause of action against the appellee for the difference in value between the watch, as represented, and its actual value, but they fall short

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of showing that felonious intent necessary to sustain a charge of obtaining goods under false pretences. We do not think the court erred in quashing the affidavit and information in this cause.

Judgment affirmed.

Filed April 25, 1889.

118 492
132 53

No. 13,720.

GOLDMAN ET AL. v. BIDDLE ET AL.

CONTRACT.—Partnership.—Agreement by Third Person to Pay Creditors.—

Complaint.—A complaint by partnership creditors against the members of the firm and G., wherein it is alleged that G., for the purpose of aiding the partners to defraud their creditors, took possession of the partnership property, and in consideration thereof agreed to pay all the creditors of the firm a certain per cent. of their claims, but has failed to pay the plaintiffs any part of the sum due them, wherefore a money judgment is demanded, states a good cause of action against G. for the amount which he agreed to pay.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellants.

B. F. Ibach, for appellees.

OLDS, J.—This action was brought by Henry C. Biddle, Thomas F. Tierney, Earl Atkinson and Robert McComb, plaintiffs, against Harvey H. Miller, Lovina J. Redinger and Louis J. Goldman.

It is an action upon an account and proceedings in attachment, and other creditors were made parties, and personal judgments were rendered in favor of the different creditors. The defendant Goldman filed separate demurrers to the sev-

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eral complaints, which were overruled, and exceptions reserved. The only error assigned and argued is by appellant Goldman, who assigns as error the overruling of his demurrers to the several complaints.

The complaints are all substantially alike. In the case of Biddle and others the complaint alleges that in the year 1884 the defendants Miller and Redinger were doing business under the name of Miller & Redinger, and while so in business became indebted to the plaintiffs in the sum of \$552.39 for goods sold and delivered by plaintiffs to them at their instance and request, a bill of particulars of which is filed with the complaint, marked exhibit "A," all of which sum is due and unpaid. That in August, 1884, Goldman, for the purpose of aiding, abetting and assisting Miller & Redinger to cheat, hinder, delay and defraud their creditors, took possession of the stock of goods and property belonging to said Miller & Redinger, agreeing with said Miller & Redinger to pay twenty-five per cent. of the amount due each and all of their creditors, he, the said Goldman, at the time well knowing that the said Miller & Redinger were indebted to the plaintiffs in the sum aforesaid, and he, the said Goldman, then and there agreeing to pay the said plaintiffs the sum of \$128.09, in consideration of said Miller & Redinger turning over to him said stock of goods and property, which was then and there of the value of \$800; and said Goldman took possession of said stock of goods and property, and claims to own all of the same, and has not paid any part of said amount due the plaintiffs as aforesaid. Prayer for a money judgment.

The complaint alleges a contract by which Goldman, for a valuable consideration received from Miller & Redinger, agreed to pay the plaintiffs twenty-five per cent. of the amount Miller & Redinger were owing to the plaintiffs, and a failure to pay the same, and that it was due.

It states a good cause of action. Indeed, it is not contended but that the complaint is good upon that theory, but it

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is claimed by counsel for appellant Goldman that it is a complaint to set aside a fraudulent sale of personal property, and that, if good at all, it must be good upon the theory on which it is pleaded.

Counsel are in error in placing such a construction upon the complaint. It alleges an agreement on the part of Goldman to pay to the plaintiffs a specific amount in consideration for Miller & Redinger turning over to him the goods, and the prayer is for a money judgment. It is evident the case was tried upon that theory, as the judgment is for the amount it is alleged Goldman agreed to pay. The same question is presented by the ruling on the demurrers to each complaint.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 25, 1889.



118	494
124	308
118	494
130	584
118	494
138	84
118	494
155	182

No. 14,454.

CHANEY ET AL. v. THE STATE, EX REL. ELY, DRAINAGE COMMISSIONER.

DRAINAGE.—*Complaint to Enforce Assessment.*—For a complaint by a commissioner of drainage to enforce the lien of a drainage assessment, which is held to be sufficient on demurrer, see opinion.

SAME.—*Report of Commissioners.*—*Power to Set Aside.*—While a drainage proceeding is *in fieri*, the court has power to set aside the report of the commissioners and order a further consideration of the petition, and its action in doing so is at most only erroneous, and can not be collaterally questioned.

SAME.—*Parties.*—*Notice.*—Where an answer to a complaint to enforce a drainage assessment alleges that the land affected was described in the

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petition for the drainage, but that the defendant was not named therein and neither had notice of nor appeared to the proceeding, but fails to show that he held the legal title to the land when the petition was filed, is bad.

SAME.—*Purchaser Pendente Lite.*—A purchaser of land during the pendency of a petition for drainage, from a grantor who is named in the petition and has notice thereof, is bound by the proceedings to the same extent as though he had held the legal title when the petition was filed and had been named therein and duly notified.

SAME.—*Lien of Assessment.—Constructive Notice.*—Under section 5 of the drainage act of 1883 (Acts of 1883, p. 179), the lien of an assessment attaches as of the date of the petition, and a purchaser *pendente lite* is affected with notice.

SAME.—*Notice.—Presumption.*—To a complaint to enforce an assessment, an answer alleging a purchase of the land by the defendant after the petition for drainage was filed, and that the defendant was not a party to the drainage proceeding and had no notice, is bad, as the presumption is that his grantor was a party and was duly notified.

SAME.—*Exhibit.—When Deemed Amended.*—Where an exhibit might have been amended in the trial court to conform it to the proof, it will be presumed, on appeal, that it was so amended.

From the Allen Superior Court.

C. E. Barrett, J. B. Harper and J. C. Chaney, for appellants.

T. E. Ellison, for appellee.

BERKSHIRE, J.—The complaint is in two paragraphs, and the defendants thereto are the appellants and one Aaron Chaney. Demurrers were filed by both of the appellants to each paragraph, and were by the court overruled, and exceptions reserved.

Separate answers were filed, in two paragraphs by Ella M. Chaney, and in seven paragraphs by John C. Chaney. The second paragraph of Ella M.'s answer, and the first paragraph of John C.'s answer, were general denials.

To the first paragraph of the answer of Ella M., the appellee filed a demurrer, and also filed a demurrer to all of the paragraphs of the answer of John C., except the first. To the answer of Ella M., the court overruled the demurrer; to the second, fourth and seventh paragraphs of the answer

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of John C., the court overruled the demurrer, and sustained it to the third, fifth and sixth paragraphs and to these rulings of the court the proper exceptions were saved. The appellee then filed a reply, putting the case at issue. The cause was then submitted to the court, and, after hearing the evidence, a finding was made for the appellee, and the relator's damages assessed, as to the first paragraph of the complaint, at \$535, and, as to the second paragraph, at \$387.56, and the said amounts were found to be liens upon the land. The appellants filed a motion for a new trial, which the court overruled, and proper exceptions were saved, and thereupon the court rendered judgment for the appellee and a decree foreclosing the liens.

There are several errors assigned; the following are, in substance, the errors relied on by counsel for the appellants and discussed in their brief, and we will notice none other:

1. The court erred in overruling the demurrer to the first paragraph of the complaint.

2. The court erred in overruling the demurrer to the second paragraph of the complaint.

3. The court erred in sustaining the demurrer to the third paragraph of the separate answer of John C. Chaney.

4. The court erred in sustaining the demurrer to the fifth paragraph of his separate answer.

5. The court erred in sustaining the demurrer to the sixth paragraph of his separate answer.

6. The court erred in overruling the motion for a new trial.

The first paragraph of the complaint is, in substance, as follows: On the 18th day of July, 1883, William Branstator and others filed in the superior court of Allen county, a petition asking for the establishment and construction of a ditch to drain certain lands therein described; that after due and legal notice thereof to the defendants and all others interested, said petition was, on the 9th day of August, 1883, docketed by the court as an action pending therein; that, on the 15th day of August, it appearing to the court that there

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had been no demurrer filed to said petition, and no remonstrance or objection had been filed to such petition showing any reason why the commissioners of drainage of Allen county should not act in said matter, and the court having found the said petition sufficient, the same was by order of the court referred to said commissioners of drainage to make report in said matter to said court on the 1st day of December, 1883. On that day the said commissioners reported that they required further time to examine the matter, which was granted, and time was extended by the court until March 1st, 1884; that, on that day, the said commissioners reported that they still required further time, which was granted, and time was extended until April 17th, 1884. On that day came the said commissioners and filed in open session of said court a report on such petition, recommending the establishment of the drainage, and fixing the amount of damages or benefits that would be sustained or received by each tract of land or easement affected thereby, of which the defendants had notice. On the 15th day of May, 1885, the first report made by said commissioners was by said court set aside and held for naught, and they were ordered to make a re-examination of said matter and file a new report on the 2d day of November, 1885; that the said commissioners re-examined said matter and made a new report, recommending the establishment and construction of such drainage, fixing the amount of damages or benefits suffered or received by each tract of land or easement affected thereby, and filed the same in open session of said court November 2d, 1885; that in said second report there were described certain tracts of land not described in the original petition; that, thereupon, said court ordered notice to be given as to the filing of said second report by said commissioners, and of the assessments of benefits on said tracts, and that said report would be heard on the 23d day of November, 1885, which notice was given to all persons as ordered by said

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court and proof thereof made to the satisfaction of the court ; that such further proceedings were had, that, on the 22d day of April, 1886, said report, as made, was approved and said drainage established, and it was adjudged and decreed by the court that said work should be constructed ; that said defendants were the owners of the following tract of land in said county of Allen, to wit : The southwest quarter of the southeast quarter of section 33, township 30, range 11 east, and that the same would be benefited \$900, and the same was declared to be a lien upon said land from the 18th day of July, 1883, and the defendants were ordered to pay the same to the superintendent appointed to construct the same, when demanded, of all of which the defendants had due and legal notice. On the 22d day of April, 1886, the relator was appointed by the said court to superintend said work, collect the assessments and do all other things necessary to complete the same and pay therefor ; that, on the 5th day of June, 1886, he caused said assessments, as finally decreed, to be recorded in the recorder's office of said county, and, on the 17th of said month, in the recorder's office of Whitley county, and, on the 5th day of said month, in the recorder's office of Huntington county. Said relator has made four assessments and declared them due and payable at the office of W. H. Goshorn, in the court-house in Fort Wayne, as follows : The first ten per centum of the benefits assessed due August 6th, 1886, the second ten per centum due November 6th, 1886, the third twenty per centum due April 30th, 1887, and the fourth fifteen percentum due June 18th, 1887 ; that due and legal notice of each and all of said assessments, and when and where payable, has been given by publication in a weekly newspaper printed and published in each of said counties for more than thirty days before each became due and payable ; that, on the 7th day of September, 1883, said Aaron Chaney, who owned said land when said petition was filed and who was named therein as the owner, conveyed said land to the defendant John C. Chaney, which deed was re-

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corded October 12th, 1883; that Ella M. Chaney is the wife of John C. Chaney; that, although often requested, the defendants fail, neglect and refuse to pay said assessments or any part of the same; that, on account of such failure, the relator has been compelled to employ an attorney to collect the same, and that a reasonable fee is \$75. Judgment is demanded for \$900 and a foreclosure of the lien.

The second paragraph of the complaint is similar to the first, except as to the description of the land, the amount of the assessment and attorney's fees.

The complaint, the substance of which we have given, contains all necessary allegations, and states a cause of action. *Laverty v. State, ex rel.*, 109 Ind. 217; *Wishmier v. State, ex rel.*, 110 Ind. 523.

The third paragraph of the answer of John C. Chaney alleges the filing of the petition, that it contained a description of said appellant's land, that the petition was, by order of the court, duly docketed as an action pending, and was thereafter referred to the drainage commissioners, and that, on the 17th day of April, 1884, they made a report to the court, and appellant's land was reported as benefited in the sum of \$540; that he did not remonstrate or appeal from the assessment; that other persons filed remonstrances, which were brought before the court and considered, and on the 15th day of May, 1885, the court made and entered of record an order setting aside said report, and ordering a further consideration of said petition by said commissioners; and as the result, on the 22d day of April, 1886, another report was made by the commissioners, whereby appellant's land was assessed \$1,550, which is the assessment the appellee is trying to enforce. It is also alleged that the appellant was not named in the petition, and had no notice, and at no time appeared.

At the time the order was made setting aside the first report, the proceedings were *in fieri*, and the court could make any order that might appear to it to be legal and proper. If it came to the conclusion, for any reason, that the report was

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not a proper one, it was within the power of the court to set it aside, as much so as to make any other order in the case, and at most its action would only be erroneous, and could not be taken advantage of in a collateral proceeding. *Jenks v. State*, 39 Ind. 1. It is not alleged in the answer when the appellant became the owner of the land. If, as appears elsewhere in the record, he obtained title to the land after the petition was filed, and the holder of the legal title at that time was named in the petition, and had notice, the appellant was a purchaser *pendente lite*, and is to the same extent bound by the proceedings as though he had held the legal title when the petition was filed, had been named in the petition and had been duly notified. *Wilson v. Hefflin*, 81 Ind. 35; *Kern v. Hazlerigg*, 11 Ind. 443; *Green v. White*, 7 Blackf. 242; *Worsley v. Earl of Scarborough*, 3 Atk. 392; *Murray v. Lylburn*, 2 Johns. Ch. 441. There was no error in sustaining the demurrer to the third paragraph of the answer.

The substance of the fifth paragraph of the answer is, that the supposed judgment was rendered without notice to the appellant of the pendency of the action, and that no process in said action was ever served on him, nor did he ever appear or authorize any one to appear for him; that at the time said action was brought he was a resident of Sullivan county, State of Indiana, and has been ever since.

It is not averred in this answer that the appellant held the legal title to the land when the petition was filed, nor is it averred that his grantor did not receive proper notice. This paragraph of answer is bad, and the court committed no error in sustaining the demurrer thereto.

The substance of the sixth paragraph of the answer is, that, on the 7th day of September, 1883, the appellant purchased the land and received a conveyance from Aaron Chaney, for a valuable consideration; that he had no notice whatever of the pendency of any action affecting said real estate, or looking to a judgment likely in any manner to affect the same; that he was not a party to the said ditch proceedings at any

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stage of the same; that he is, and has been for the last fifteen years, a resident of Sullivan county, State of Indiana.

As there is no averment that the grantor of the appellant, who held the legal title when the petition was filed and notice given as averred in the complaint, was not a party and did not have notice, therefore the presumption must be that he was a party and did have notice, and the plaintiff, having purchased during the pendency of the proceedings, is bound by the notice given to his grantor. The case of *Cook v. State, etc.*; 101 Ind. 446, is not in point. That was a case where a mortgagee took a mortgage, before the lien had attached, without notice. The statute makes the assessments liens from the date at which the petition was filed, and as the result the appellant purchased the real estate with the liens upon it, and with constructive notice thereof. Acts 1883, section 5, p. 179. This paragraph of the answer was bad, and the court committed no error in sustaining the demurrer thereto.

We come now to the error assigned because of the overruling of the motion for a new trial. There is nothing in the motion to set aside the summons, and as the appellants' counsel seem to have no confidence in it, we need not say more in regard to it.

It is urged that the court erred in permitting the appellee to introduce in evidence the assessment upon which the action is brought, for the reason that the court could not make an order setting aside the first report and again refer the petition to the commissioners, without notice being first given to the appellants. We are not of this opinion. As we have already stated, the proceedings were pending, and, after due notice had been given of the filing of the petition, all parties thereto and all persons claiming under them were in court for all purposes relating to the proceedings, and bound thereby. It is also contended that there is a variance between the assessment sued on and the one introduced in evidence, the one sued on being against Aaron and John C.

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Chaney, and the one introduced in evidence being against Aaron Chaney alone. They are exactly the same, except in one the name of John C. Chaney appears, and in the other it does not. The exhibit could have been amended on the trial, and will be presumed to have been amended by this court. *Buchanan v. State, ex rel.*, 106 Ind. 251.

Judgment affirmed, with costs.

Filed April 26, 1889.

No. 14,868.

HOVEY, GOVERNOR, ET AL. v. FOSTER.

STATE FINANCE.—Act Authorizing Loan.—Constitutional Law.—The act of March 21th, 1889 (Acts of 1889, p. 390), "authorizing the Governor, auditor and treasurer of State to make a loan for the purpose of carrying on the State government," does not violate section 5 of article 10 of the Constitution, and is a valid law.

SAME.—"Casual Deficits."—Meaning of Term.—The term "To meet casual deficits in the revenue," as used in section 5 of article 10 of the Constitution, which specifies the contingencies in which the Legislature may authorize a debt to be contracted on behalf of the State, means a deficit not designedly brought about, but one resulting from casual or occasional discrepancies between the revenues received and the amounts required to provide for the general welfare and carry on the State government in the ordinary way, which could not be foreseen and provided for without the accumulation of an unnecessary surplus in the treasury.

SAME.—Power of Legislature.—When its Action not Subject to Review.—While the power of the Legislature to authorize a debt to be contracted on behalf of the State does not exist until a contingency contemplated by the Constitution arises, yet when such a contingency has in fact arisen, or when the Legislature, without any apparent purpose to evade the Constitution, determines that it has, its action is not subject to review or liable to be controlled by the judicial department, unless it is evident at

118	502
143	315

118	502
151	155

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first blush that the conditions justifying the exercise of the power did not exist.

SAME.—*Deficit May be Anticipated.*—It is not necessary to the validity of an act authorizing the borrowing of money on behalf of the State that an actual deficit should exist at the time the act is passed, for a casual deficit, within the meaning of the constitutional provision, may be one that is anticipated and provided for, if it is foreseen that it must necessarily occur before other provisions for replenishing the public funds can be made available.

SAME.—*Method of Providing for Deficit.—Legislative Discretion.*—It is a matter within the discretion of the Legislature as to what provision shall be made, whether by increasing the tax levy or by contracting a debt, in order to provide for an inevitable deficit.

SAME.—*Title of Act.*—The fact that it is recited in the title of an act that the loan thereby authorized is for the purpose of carrying on the State government, rather than to provide for a casual deficit, is immaterial.

From the Marion Circuit Court.

L. T. Michener, Attorney General, and *J. H. Gillett*, for appellants.

S. M. Shepard and *C. Martindale*, for appellee.

MITCHELL, J.—By an act entitled “An act authorizing the Governor, auditor and treasurer of State to make a loan for the purpose of carrying on the State government, making provisions for the funding of the present outstanding temporary loan at a lower rate of interest, and concerning matters in connection therewith, and declaring an emergency,” approved March 11th, 1889 (Acts of 1889, p. 390), the officers named in the above title were authorized to make a temporary loan of \$700,000, and, if necessary to meet the appropriations made by the General Assembly, to make a further loan of a like sum, on or after the 1st day of September, 1889. For the purpose of borrowing the sums mentioned, the Governor, and other officers named, were authorized to issue and sell the bonds of the State, redeemable at the pleasure of the State after five years, and payable in ten years, bearing interest at three per centum per annum, payable semi-annually. There were other provisions in the act, having ref-

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erence to the funding of the temporary loan indebtedness of the State, at a lower rate of interest.

The Governor, auditor and treasurer, proceeding under the authority conferred by the above mentioned act, caused a certain series of bonds, equal in amount to the loan authorized to be made upon the taking effect of the act, to be prepared, which they were about to negotiate and sell according to the terms of the act, when the relator instituted this proceeding to enjoin the chief executive and the other officers from making the loan, and from issuing or negotiating the bonds. The ground upon which the intervention of the court was asked is, that the Constitution expressly prohibits the authorization of any debt to be contracted on behalf of the State, except in certain enumerated contingencies. It is alleged that the debt about to be contracted was not intended to meet any of the contingencies provided for in the Constitution, and that the act was therefore unconstitutional and void.

It appears in the record by the answer of the respondents, that, prior to the meeting of the General Assembly in January, 1889, the auditor had made his official report to the Governor, in which he exhibited the financial condition of the State. Estimating the probable income to the treasury on the basis that the tax levy would be continued at the existing rate, and computing the amounts required to meet "immediate appropriations," which the auditor deemed necessary to be made by the Legislature soon to assemble, in order to cover existing obligations, and such other appropriations as in his judgment would be required to meet current and necessary expenses, and to complete buildings and improvements for various benevolent and other State institutions then under contract and in course of construction, it appeared that there would be a deficit in the revenues before the succeeding Legislature, in 1891, would assemble, amounting to \$1,650,110.

In response to a resolution of the House of Representa-

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tives, asking the Governor for a statement of what deficiencies there would be in the revenues for the fiscal years ending October 31st, 1889, and October 31st, 1890, and what amount of temporary loan, if any, would be necessary to conduct the business of the State, the executive laid before the House, in an official message, a detailed statement of the estimated receipts and expenditures for the two fiscal years then next to ensue.

It appeared in the message and the exhibits therewith submitted, that, if the tax levy was continued at the rate then fixed by law, it would be necessary, in order to pay the sums appropriated for various purposes by the General Assembly, at its session in 1887, which remained undrawn, and the sums appropriated by the Legislature then in session, and to defray the current expenses of carrying on the State government for two years, to make a loan of \$2,200,000, so as to supply the deficiency in the revenues of the State thus created. After due consideration of the facts thus presented, the act in question, which authorizes a loan of \$1,400,000, one-half of which was authorized to be made presently, and the remaining \$700,000 on and after the 1st day of September, 1889, if it shall be necessary to meet the appropriations made by the General Assembly, was duly passed and approved. The question presented involves the constitutionality and validity of the act of the General Assembly under which the Governor and the other officers therein named were proceeding to make the loan.

Upon the subject of creating a debt the Constitution contains the following: "No law shall authorize any debt to be contracted on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State debt; to repel invasion, suppress insurrection, or, if hostilities be threatened; provide for the public defence." Const., art. 10, sec. 5.

It is apparent that the purpose with which this provision was framed and adopted was to impose restrictions upon the

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power of the Legislature to authorize debts to be contracted on behalf of the State to an unlimited amount. This is clear from the language employed. It is equally clear, too, that, upon the happening of certain contingencies, the power of the Legislature in respect to certain debts was to remain unfettered. On the one hand, the evils of an enormous public debt, the legacy of the system of public improvements in which the State had theretofore embarked, were fresh in the minds of the people when the present Constitution was adopted. This was the mischief that was not to be repeated. On the other hand, it was foreseen that without gathering from the pockets of the people, and carrying a large surplus in the treasury of the State, no human provision could prevent occasional deficits in the revenues. The tax levy could not possibly be adjusted to the necessary expenses of carrying on the State government, and of providing and maintaining the public buildings and institutions of the State, and for such other appropriations as are clearly within legislative discretion, without an occasional surplus or deficit. It was, therefore, contemplated that deficits would occur; that an enemy might invade, insurrection arise, or hostilities threaten, making provision for the public defence necessary. A public debt existed at the time, and interest thereon would mature. Upon the happening of either of these contingencies, the discretion of the Legislature, in providing the means to meet it, was, as necessarily it should have been, left without restriction. In all other respects the power of the Legislature to authorize a debt to be contracted on behalf of the State was taken up by the roots.

In order to justify the exercise of legislative discretion in the enactment of a law such as the one in question, there must have been a deficit in the revenues required to meet the ordinary appropriations made for the purpose of carrying on the government, and of providing for the general welfare of the State and its institutions. The deficit must have been casual, in the sense that it must not have been

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designedly brought about by making extraordinary appropriations for purposes other than those above named, with a view to evade the constitutional inhibition, and to authorize the contracting of a debt on behalf of the State in disregard of its terms. It must have resulted from those casual or occasional discrepancies between the revenues received and the amounts required to provide for the general welfare, and carry on the State government in the ordinary way, which could not be foreseen and provided for without the accumulation of an unnecessary surplus in the treasury.

Words, in a constitutional provision, which were employed to confer a power upon the Legislature to contract debts on behalf of the State, in order to provide for the safety and general welfare of the people, while they are to be construed strictly as granting nothing outside of the contingencies enumerated upon which the exercise of the power depends, "are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes." *Legal Tender Case*, 110 U. S. 421 (444).

While the power to act does not exist until the contingency arises, the Legislature must of necessity be left with large discretion in determining whether or not the contingency has arisen which calls forth the exercise of the power. When it has in fact arisen, or when, in the exercise of its sound discretion, the Legislature, without any apparent purpose to evade the Constitution, determines that it has, and authorizes a debt to be contracted, unless it is apparent at first blush that the conditions did not exist which justified the exercise of the power, the action of that body is not subject to review, or liable to be controlled by the judicial department. *Franklin v. State Board*, 23 Cal. 173.

Governments can not be conducted without lodging power somewhere. Wherever it may be lodged it is liable to be abused, or to be improvidently exercised. But while we as-

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sert the power of the courts to decide on the constitutionality of every law that may be passed, we nevertheless recognize the rule as well settled, which declares that when an act is passed in the exercise of a power or duty expressly committed to the Legislature, or when the validity of an act depends upon the ascertainment of facts which must have existed antecedent to the law, all that courts can do is to inspect the act, and determine from its scope and tenor, and the concurrent history, of which they take judicial notice, whether or not it is apparently within the power conferred, assuming that the requisite facts were ascertained. The power of obtaining information for the purpose of framing laws to meet existing or apprehended contingencies, is within the legitimate province of a legislative body, and to that end it may summon witnesses and hear testimony in proper cases. *People v. Keeler*, 99 N. Y. 463; *Kilbourn v. Thompson*, 103 U. S. 168.

Courts can not make an issue of fact, or review the facts as such, upon which the Legislature must be presumed to have passed, in order to determine the validity of an act of the Legislature. *People v. New York Central R. R. Co.*, 34 Barb. 123 (138); *Lusher v. Scites*, 4 W. Va. 11; *State v. Noyes*, 47 Maine, 189; *Cass Township v. Dillon*, 16 Ohio St. 38 (41). All matters of public policy, or of political concern, or which affect the general welfare of the people, are subjects peculiarly within legislative discretion. Subjects relating to taxation and the revenues are peculiarly of that character. *Quick v. White-Water Township*, 7 Ind. 570 (576).

While the Legislature should see that revenues are raised and disbursed only for the public good, as has been well said, "what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which can not be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under

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pretence of a lawful authority, it has assumed to exercise one that is unlawful." Cooley Const. Lim. (5th ed.), p. 155; *Heick v. Voight*, 110 Ind. 279; *Walker v. City of Cincinnati*, 21 Ohio St. 14; *Town of Rensselaer v. Leopold*, 106 Ind. 29.

An evasive or unlawful purpose will not be presumed; on the contrary, the courts will indulge all presumptions favorable to the action of a co-ordinate branch of the government. For example, the General Assembly is denied the power to pass special laws, except where a general law can not be made applicable. But as the Constitution does not declare the circumstances under which special laws may be passed, or what conditions must first exist before a general law can not be made applicable, it is the established rule that the Legislature is the exclusive judge of whether or not a law could properly be made general and of uniform application throughout the State. Hence the rule, that if a local law be enacted, it must be conclusively presumed that the Legislature found that a general law could not be made applicable. *Wiley v. Corporation of Bluffton*, 111 Ind. 152, and cases cited. It by no means follows that the power of the Legislature is without limit or control in respect to creating or contracting debts against the State. As before remarked, courts are supposed to take cognizance of the current public history of affairs, and to construe enactments of the General Assembly in the light of concurrent history. If, under pretence that an invasion was threatened, or that an insurrection was imminent, the Legislature should authorize a loan when it was a known fact to every intelligent person that the assumption was a mere pretence, courts would not hesitate to declare the act void. So, if it were known that the Legislature had authorized or was about to authorize the use of State funds in the construction of a railroad, canal, or other public work or institution, not within the ordinary and legitimate needs of the State, and that a loan was about to be authorized to meet appropriations made to defray the expense of such a work, under the guise of meeting a deficit

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to carry on the government of the State, it would be the duty of the courts, when called upon, to take cognizance of the facts, and arrest what they would judicially know to be a mere pretext to evade the Constitution. *Williams v. Louisiana*, 103 U. S. 637. The court has no such knowledge concerning the enactment of the law here in question; on the contrary, the court has knowledge that the State has been engaged for several years in providing public buildings and necessary State institutions, and that unusual and unforeseen expenditures have been required, calling for appropriations of public money. We also take notice that a public law has been enacted under which a suitable memorial to the valor and patriotism of Indiana soldiers is in process of erection at the capital of the State. All these are subjects which pertain to the public welfare of the people, and are within ordinary legislative discretion. We are bound, therefore, to presume that the Legislature, acting upon official information received from the Governor and otherwise, after due deliberation upon all the facts, ascertained that in order to meet necessary appropriations, which it was their duty to make in order to cover past deficiencies and carry on the State government until the meeting of the next Legislature, a casual deficit would result in the revenues, such as authorized the contracting of a debt on behalf of the State.

The Constitution requires that no money shall be drawn from the treasury but in pursuance of appropriations made by law. The courts take notice of the fact that the meetings of the General Assembly are biennial, and that appropriations must be made in advance to cover the intervening two years, and until the meeting of the next General Assembly. It was therefore not necessary that an actual deficit should have existed in the revenues at the time the act was passed.

A casual deficit, such as may authorize the contracting of a debt on behalf of the State, may be one that is anticipated and provided for, if it is foreseen that it must necessarily oc-

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cur before other provisions for replenishing the public funds can be made available. It was a matter within legislative discretion what provision should be made, whether by increasing the levy or by contracting a debt, in order to provide for the deficit which was inevitable.

It was the duty of the Legislature to make provision so that the executive and administrative departments could execute the laws and carry on the government of the State with credit to the people. Contracts have been entered into, in pursuance of public laws, which could not be abandoned or repudiated without violating good faith. It is a legitimate part of the conduct of the State government that the executive and administrative officers thereof be authorized, and furnished with the means, to save the credit of the State. That it was recited in the title of the act that the loan was authorized for the purpose of carrying on the State government, rather than to provide for a casual deficit, is of no consequence. All presumptions are to be indulged in favor of the validity of the law.

There are no valid objections to the law. The point made concerning the sufficiency of the title is not maintained. The conclusions thus reached result in a reversal of the judgment of the circuit court.

Judgment reversed, with costs.

Filed April 26, 1889.

118	512
121	476
118	512
147	583

No. 13,271.

PEELLE v. THE STATE, EX REL. HIPES.

GUARDIAN AND WARD.—*Appointment of Guardian.—Irregularity.—Bond.—*

An irregularity in the appointment of a guardian is not available as a defence in an action upon his bond. Section 2516, R. S. 1881.

SAME.—*Conversion.—Statute of Limitations.*—In an action by a ward upon his guardian's bond for money converted, the statute of limitations is only available as a defence from the date of the conversion and not from the date of prior breaches of duty.

SAME.—*Guardian not a "Public Officer."*—A guardian is not a public officer within the meaning of the second subdivision of section 293, R. S. 1881, limiting the time for the bringing of actions upon the bond of such an officer to five years.

SAME.—*Case Doubted.*—It is questionable whether the decision in *Jones v. Jones*, 91 Ind. 378, is not unsound in so far as it holds that an action on a guardian's bond must be brought within six years after the cause of action accrues.

SAME.—*Accounting.—Insufficient Answer of Settlement.*—To a complaint upon a guardian's bond, an answer that all sums of money received by the guardian were paid to the relator "after his arrival at twenty-one years of age, by his guardian, and were paid out to others for the relator's schooling and board," is bad, as it neither shows a payment of the entire sum to the ward nor a right to pay money out for the purposes mentioned.

SAME.—*Removal from State.—Remedy of Ward.*—Where a guardian removes from the State during the minority of his ward, the failure of the latter to then institute an action upon his bond does not bar or affect the ward's right to subsequently sue upon a cause of action accruing to him by the guardian's failure to account when he becomes of age.

SAME.—*Penalty of Bond.—Mistake.*—An error of judgment made by the county clerk in fixing the penalty of a guardian's bond at too large a sum, is a mistake of law and can not be corrected by the courts.

SAME.—*Estoppel of Obligors.*—Where the obligors in a guardian's bond have treated the bond as valid, and have permitted the guardian to receive a large sum of money without questioning the amount of the penalty, they can not afterwards have the penalty reduced to the injury of the ward.

SAME.—*Several Judgment Against Sureties.*—In an action upon a joint and several guardian's bond, a failure to obtain service upon the principal does not defeat the right to a judgment against the sureties.

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SAME.—Measure of Damages.—Interest.—Penalty.—Where the breach relied on is the failure of the guardian to account to the ward when he became of age, and it does not appear that the guardian actually received and appropriated interest, the measure of recovery, as against the sureties, at least, is the amount due, including simple interest, to which the court may, if it deems it proper in the particular case, add ten per centum penalty.

SAME.—Exemplary Damages.—Exemplary damages can not be awarded against unoffending sureties in a guardian's bond.

From the Wayne Circuit Court.

T. J. Study, S. J. Peelle, S. C. Whitesell and W. A. Peelle,
for appellant.

C. H. Burchenal and J. L. Rupe, for appellee.

ELLIOTT, C. J.—The relator's complaint is founded upon a guardian's bond executed by James W. Boyd, as principal, and the appellant, as surety. The surety is the sole defendant; no process was served upon the principal.

It is said by appellant's counsel that the complaint is bad, "because it is alleged that the guardian was appointed by one power, and the exhibit shows that he was appointed by another." We think this objection is not well founded in fact. The averment in the body of the complaint is, that the guardian was appointed, upon petition, by the court, and the exhibit simply shows that the bond was approved by the clerk. If it be conceded that this was irregular, still the bond is not invalid, for our statute protects the beneficiaries in the bond of a guardian against such an irregularity. R. S. 1881, section 2516; *State, ex rel., v. Britton*, 102 Ind. 214.

The second objection to the complaint is thus stated: "It is bad because it alleges that the guardian never made any inventory of the money or property in his hands, and never made any report to the court. Thus failing in the first twenty years to file an inventory, and in the last eighteen years to file an account, and showing, too, that the relator had arrived at the age of twenty-five years before this action

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was brought." This position is not tenable. It is true that the statute of limitations begins to run during minority, and that the action must be brought within two years after the disability is removed, in cases where the full period has run. *Wright v. Kleyla*, 104 Ind. 223; *Barnett v. Harshbarger*, 105 Ind. 410; *Sims v. Gay*, 109 Ind. 501; *Walker v. Hill*, 111 Ind. 223; *Davidson v. Bates*, 111 Ind. 391; *City of Indianapolis v. Patterson*, 112 Ind. 344. But the cause of action for the conversion of the relator's money did accrue within twenty years from the time the action was instituted, for, although there may have been other breaches of the bond, the cause of action for the conversion of the money did not accrue when those breaches occurred, but accrued at a time long subsequent.

A guardian is under a duty to make reports as the law requires, but a breach of this duty does not give a cause of action for money unlawfully converted by him, and neither he nor his sureties can avail themselves of such a breach to defeat a ward, suing for money wrongfully appropriated, upon the ground that the statute of limitations began to run from the date of that breach.

This action is not governed by the provisions of the statute prescribing the time within which actions upon the bonds of public officers shall be brought. A guardian is not a public officer within the meaning of the second subdivision of section 293, R. S. 1881. *Owen v. State, ex rel.*, 25 Ind. 107.

The second paragraph of the answer avers that the cause of action did not accrue within five years before the action was brought. It is clear from what we have already said that this answer is bad.

The third paragraph of the answer avers that the cause of action accrued on the 15th day of August, 1880; that, at that date, the relator was twenty-one years of age, and that this action was not brought until the 27th day of August, 1885. This answer is, for the reasons already stated, clearly bad. The right of action for the conversion of the money

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did not accrue until the relator attained his majority, on the 15th day of August, 1880, and this action was brought within six years from the time the cause of action accrued. Conceding that the case of *Jones v. Jones*, 91 Ind. 378, is rightly decided, still it does not apply here, for the action was brought within six years after the cause of action accrued. It is doubtless true, that, as decided in the case cited, and the cases of *Kidwell v. State, ex rel.*, 45 Ind. 27, and *Stroup v. State, ex rel.*, 70 Ind. 495, that the trust expired and the cause of action accrued when the relator became of age, but it does not follow from this, by any means, that he had only two years from that time within which to sue on the guardian's bond. We regard it as very questionable whether the decision in *Jones v. Jones, supra*, is not unsound in so far as it declares that the action on the bond must be brought within six years after the cause of action accrues, but it is not now necessary for us to pass upon that question, for here the action was brought within six years.

The fourth paragraph of the answer avers "that any and all sums of money received by James W. Boyd, as the guardian of the relator, were paid to him after his arrival at twenty-one years of age, by his guardian, and were paid out to others for the relator's schooling and board." This answer would be good if it showed a payment to the relator of the entire sum received, but this it does not do. For anything that appears, only a trifle may have been paid to him. In so far as the answer attempts to defeat the action by averring the payment of money for the ward's board and schooling, it is bad, for the reason that it does not show that the guardian had a right to pay out his ward's money for that purpose. It may well be that the ward could earn, and did earn, his own board, or that it was provided for him by those under a legal obligation to provide it. *Kinsey v. State, ex rel.*, 98 Ind. 351, and cases cited. The guardian must affirmatively show that the ward's estate justified the expenditure of the money for

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which such a credit is claimed. *State, ex rel., v. Roche*, 91 Ind. 406.

The sixth paragraph of the answer alleges that Boyd removed to the State of Illinois on the 10th day of February, 1876, and that the relator was at that time seventeen years of age. The ninth paragraph is substantially the same as the sixth. The appellant assumes that these answers are good, because section 2525, R. S. 1881, provides that when a guardian removes from the State an action may at once be brought on his bond. We do not regard this position as maintainable. The guardian might have been sued on his bond when he removed from the State, but the failure of the ward to sue did not justify the guardian in failing to pay over the money in his hands to his ward when he became of age. This duty continued, notwithstanding the fact that suit might have been instituted when the guardian left the State. As the duty continued, there was no breach until the ward attained his majority. It was then that the present cause of action fully accrued. But, conceding that some cause of action accrued when the guardian removed from the State in 1876, yet this action was not barred, for it is not an action based upon the removal of the guardian, but upon his failure to pay over to his ward the money which belonged to him.

The eighth paragraph of the answer alleges that the guardian filed an affidavit prior to his appointment, wherein he stated that the real estate of his ward was worth \$1,200, and was of the rental value of \$65; that he had no personal estate; that the clerk, by mistake, fixed the penalty of the bond at the sum of \$2,400. Prayer that the mistake of the clerk be corrected. The pleading is not good. If there was a mistake it was a mistake of law, and such mistakes can not be corrected by the courts. The case is not like that of individuals making a computation of amounts, but the case is that of a public officer who has erred in discharging an official duty requiring the exercise of his judgment. But we hold that even if the mistake were of a character that could be

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corrected, the obligors are not in a situation to secure a correction. Having permitted the guardian to receive a large sum of money on the faith of the validity and adequacy of the bond, they can not be allowed to cause the ward loss by reducing the penalty. The conduct of the obligors and their long acquiescence preclude them from changing the bond to the injury of the relator. In our opinion the case is within the principle declared in *Lucas v. Shepherd*, 16 Ind. 368, and *Carver v. Carver*, 77 Ind. 498. The parties have acted upon the bond, have treated it as valid, and have not questioned the amount of the penalty, and it is too late to reduce the penalty at the ward's expense.

The appellant's counsel argue that, because Boyd was not served with process, the trial court erred in admitting any evidence against their client. We can not assent to this doctrine. The relator had a right to a judgment against the surety, although the principal was not served with process. The failure to get service on the principal does not defeat an action against the surety. The bond is joint and several and the relator might have sued the surety without joining the principal.

The guardian testified that he received the money with which the court charged the appellant, and this testimony fully supports the finding. The counsel assume that the guardian could not, under the pension laws, have received the amount he testified that he did receive, because the pension allowed would not equal that amount, but this argument assumes that no arrearages were collected by the guardian, and in the face of the positive testimony of the guardian that he did actually receive the sum he names, this assumption can not be maintained.

We are satisfied from an examination of the evidence that the damages were assessed on an erroneous theory and that there is an error in the amount of the recovery. It is conceded by appellee's counsel that the only breach relied on is the failure of the guardian to account to the ward when he

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became of age. Under the rule as declared in *Baldrige v. State, ex rel.*, 69 Ind. 166, the penalty for the breach here relied on is the assessment of the amount due the ward with ten per centum on the amount found due. Under this rule it is not proper to compound the interest, but the true method is to compute simple interest, add it to the principal, and, should the court deem it proper in the particular case, add to this amount ten per centum. We incline to the opinion that the penalty of ten per centum prescribed is the exclusive one. but we do not now so decide. What we here decide is, that, as against the surety, and in such a case as this, the damages are to be assessed in the method we have indicated. In the *Matter of the Guardianship of Lara E. Thurston*, 57 Wis. 104, the court said: "The result of all the authorities seems to be that only in cases of fraud or flagrant breach of trust should the guardian be charged with compound interest." A similar statement was made in *Kinsey v. State, ex rel.*, 71 Ind. 32, 40. In *Dufour v. Dufour*, 28 Ind. 421, rests were made in computing interest in accordance with the chancery practice, but the court held that this was erroneous. It seems, therefore, that in such a case as this, where the guardian does not actually receive and appropriate interest, but simply keeps the money in his hands and refuses to pay it over to the ward when he becomes of age, the amount of the recovery is the principal, simple interest and the statutory penalty. We think, at all events, this rule, as in favor of a surety, is the one that should be applied to a case like this, where the sum received was comparatively small and was received in very small amounts, and where it does not appear that it could have been or was invested by the guardian. Each case must depend, in a great degree, upon its particular circumstances and we do not undertake to lay down any general rule, but restrict our decision to the case as the record presents it.

The courts are careful—and so they should be—to protect the interests of wards, but it is not to the interest of wards to

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impose heavy penalties upon sureties. If penalties are uncertain and severe, men of financial ability will be slow and reluctant to undertake as sureties for guardians. While the penalty should be heavy enough to fully reimburse the ward and to move the guardian to faithfully perform his duty, it should not be so severe as to punish sureties. It is not the object of the law to punish sureties, but to fairly compensate beneficiaries. A surety does not occupy the position of a guardian who has committed a wrong, although he is responsible for the loss occasioned by that wrong.

Appellee's counsel affirm that the trial court had authority to award exemplary damages, but under the rule declared in *State, ex rel., v. Stevens*, 103 Ind. 55, this position can not be maintained. In that case it was held that a definite penalty might be designated, but that an unrestricted right to assess exemplary damages could not be conferred upon the courts. In cases of this class, if there is a violation of law deserving punishment, the guardian should be prosecuted for a crime; if there is not such a violation, then his sureties should not be punished. It is doubtful whether, in any case, a surety guilty of no personal wrong can be punished, for all that should be required of him is that he make adequate compensation to the injured party.

Judgment reversed.

Filed April 26, 1889.

 Russell et al. v. Senior.

118	520
150	624
152	434

No. 13,719.

RUSSELL ET AL. v. SENIOR.

SURVEY.—*Title to Real Estate.*—*New Trial as of Right.*—A survey had under the provisions of section 5955, R. S. 1881, does not determine the title to real estate, and a party is not entitled to a new trial as of right under section 1064, R. S. 1881.

From the Clinton Circuit Court.

J. Claybaugh and *G. Sexson*, for appellants.

T. H. Palmer and *W. F. Palmer*, for appellee.

OLDS, J.—This was an appeal taken from a survey under the provisions of section 5955, R. S. 1881. Trial had and a resurvey ordered. There was a resurvey, and the resurvey approved by the court. Within one year from the date of the judgment of the court approving the survey, the appellants filed a bond for costs, and moved the court for a new trial as of right, under section 1064, R. S. 1881, which motion was overruled, and exceptions reserved, and appellants prosecute this appeal and assign as error the overruling of the motion for new trial.

It is contended by counsel for appellants that the survey settled the title to disputed real estate. In this they are in error.

In the case of *Cleveland v. Obenchain*, 107 Ind. 591, this court says: "A land-owner who submits to a survey does not by so doing lose any of his land. In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land, or any part of it."

In the case of *Riggs v. Riley*, 113 Ind. 208, it was held that a survey establishing a line between adjoining land-owners will not defeat a title previously perfected by adverse

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possession for more than twenty years, nor revive the right of the original owner. See *Voltz v. Newbert*, 17 Ind. 187. All that a survey does is to establish the line, and it does not determine the title to the real estate. It is proper to introduce evidence of possession, and of other facts, to aid in arriving at the true line and boundary, but not for the purpose of settling the title. The authorities we have cited are decisive of the question in this case. There was no error in overruling the motion for a new trial.

Judgment affirmed, with costs.

Filed April 27, 1889

118	521
120	561
118	521
131	56

No. 13,728.

CRATER v. CRATER.

HUSBAND AND WIFE.—*Wife May Maintain Ejectment against Husband.*—Under the statutes of this State, a wife may maintain an action of ejectment against her husband to recover the possession of her separate real estate.

SAME.—*Wife's Separate Real Estate.*—*Void Contract.*—A contract made by a married woman in 1866, whereby she agreed, in consideration that her husband should pay a claim against her separate real estate, that she would give him one-half of the land, to be held by them as joint tenants, was void under the law then in force (1 R. S. 1876, p. 550, section 5), and the husband acquired no enforceable right thereunder.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

J. M. Vanfleet, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant in the court below to recover the possession of the land described in the complaint.

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The complaint does not differ from the ordinary complaint in ejectment, except in that it discloses the fact that appellant and appellee are husband and wife, living separate and apart from each other.

The appellant answered the complaint by a general denial. He also filed a counter-claim, in which he avers that he married the appellee in the year 1866; that at the time of such marriage there was a valid and subsisting claim against said land in favor of one David W. Fisk, amounting to the sum of \$600; that said land at said time was worth no more than \$900; that appellee had no money or means of obtaining money with which to satisfy said demand, so a lien and encumbrance on said land, and to enable her longer to hold and maintain her title to the same, and was about to and would have wholly lost said land; that appellant was in possession of \$400, and at the earnest solicitation of the appellee, and upon her verbal promise to him that he should, if he would pay off said claim, be a joint owner with her in said land, he laid out and expended \$400, and gave his notes, which he subsequently paid, with his own money, for the balance of said claim so held by the said Fisk; that ever since the year 1866 appellant and appellee have lived together as husband and wife on said land until the — day of February, 1885; that during all said time he has paid all taxes and assessments against said land, amounting to \$500; that in 1866 said land was all uncleared wild land, and that appellant, by his own labor, has cleared up and reduced to cultivation all of said land, and has made all of the improvements thereon; that, on the — day of February, 1885, while appellant was away from home, the appellee, without his knowledge or consent, and without any fault on his part, removed from the said land and the home of the appellant, and went to reside in the city of Elkhart; that appellant remained upon said land, living upon and farming the same to the time of filing this counter-claim; that he now is, and at all times has been, willing that appellee shall return to their said home and en-

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joy with him the use and benefit of said land. Prayer that he have such relief as he is, in equity and good conscience, entitled to receive in a court of equity.

A demurrer was sustained by the court to this paragraph, and the appellant excepted.

The cause was tried by a jury, resulting in a verdict for the appellee. Over a motion for a new trial the court rendered judgment on the verdict, and the appellant excepted. In this court the appellant assigns as error :

1st. That the court below erred in sustaining appellee's demurrer to appellant's second answer or counter-claim.

2d. That the court erred in overruling appellant's motion for a new trial.

It is settled law in this State that the wife may sue the husband in relation to her separate property. *Wilkins v. Miller*, 9 Ind. 100 ; *Scott v. Scott*, 13 Ind. 225. Under section 254, R. S. 1881, a married woman may sue alone : *First*. When the action concerns her separate property. *Second*. When the action is between herself and husband.

By section 5116, R. S. 1881, it is declared that her lands, and the rents and profits therefrom, shall be her separate property as fully as if she were unmarried. And by section 5129 it is provided that all suits in relation to the wife's lands, if they be separated, shall be prosecuted in the name of the wife alone.

In New York, under statutes very similar to our own, it was held that the wife might maintain an action of ejectment against her husband for her separate real estate. *Wood v. Wood*, 83 N. Y. 575. It is our opinion that the wife, in this State, may maintain an action of ejectment against her husband to recover the possession of her separate real estate.

From the allegations in the appellant's counter-claim we are left in some doubt as to the nature of the claim held by Fisk against the land of the appellee, but it is to be inferred that it was in the nature of a lien. As we understand the averments, there was a contract made between the appellant

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and the appellee to the effect that, in consideration that appellant would pay off and discharge such claim, whatever its nature, the appellee would give him one-half the land, to be held by them as joint tenants. The question is, was that such a contract as the appellant can enforce against the appellee? And in deciding that question reference must be had to the law in force in 1866, the time at which the contract was made. At the time the contract set up in the appellant's counter-claim was entered into, the following statute was in force:

"Section 5. No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join." 1 R. S. 1876, p. 550.

It has frequently been held that, under the laws in force at that time, a married woman had no power to bind herself by contract. *Thomas v. Passage*, 54 Ind. 106; *Williams v. Wilbur*, 67 Ind. 42; *American Ins. Co. v. Avery*, 60 Ind. 566; *Hamar v. Medsker*, 60 Ind. 413; *Behler v. Weyburn*, 59 Ind. 143. The general rule is, that where a person in whose name a conveyance of property is taken is one for whom the party paying the purchase-money is under a natural or moral obligation to provide, no resulting or presumptive trust will arise, but the transaction will be regarded as an advancement for the benefit of the grantee under the conveyance. In the absence of the agreement set up in the counter-claim such would be the presumption here.

This case, in its facts, is very much like the case in *Lochenour v. Lochenour*, 61 Ind. 595. In that case Joseph Lochenour entered a tract of land in the name of his wife, and suffered the patent to issue in her name, under an agreement that she would hold it in trust for him. In that case the court says that: "In the case at bar, the plaintiff was a married woman, the wife of the defendant, at the time the alleged

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declaration of an express trust was made by her. She was, therefore, then incapable of making such a declaration, or of becoming trustee for the defendant, in the manner set forth in the counter-claim under discussion." That case would seem to be decisive of the case now under consideration. It is true that the transaction reported in that case was had while the statute of 1838 was in force, but in 1866 married women were under the same legal disabilities as to contracts as in 1838. We do not think the circuit court erred in sustaining the demurrer of the appellee to the counter-claim now under consideration.

On the trial of the cause the appellant offered to prove, substantially, the facts set up in his counter-claim, but upon objection of the appellee the evidence was excluded. What we have said in relation to the counter-claim disposes of this question also. We find no error in the record for which the judgment of the court below should be reversed.

Judgment affirmed.

Filed April 27, 1889.

No. 14,730.

CARNEY v. THE STATE.

CRIMINAL LAW.—*Rape.—Consent.—Reputation for Chastity.—Instruction.—*

Where, in a prosecution for rape, the defendant claims that the intercourse was with consent, it is material error to instruct the jury that evidence of the bad reputation of the prosecuting witness for chastity was introduced only for the purpose of affecting her credibility as a witness.

From the Clark Circuit Court.

F. B. Burke and *A. G. Caruth*, for appellant.

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ELLIOTT, C. J.—The evidence upon which the appellant was convicted of the crime of rape is not of a very satisfactory character, although it is probably true that if the sole question were whether we should set aside the verdict on the evidence, we should be compelled to sustain the finding of the jury. But while it may be true that it can not be said that there is no evidence sustaining the verdict, still it is true that there is much evidence, direct and circumstantial, against it, so that the case is one in which the accused was entitled to have the law given to the jury clearly and accurately. It was not so given. One, at least, of the instructions is radically wrong. That instruction is this: "Evidence has been introduced as to the moral character of the prosecuting witness, and as to her reputation for chastity and virtue. You are not to understand from this that a rape can not be committed on a woman of bad moral character. A woman may be a common prostitute and still be the victim of rape. This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as to how far such proof has affected her credibility is for the jury to say, taking all the testimony into consideration."

The accused admitted that he did have sexual intercourse with the witness, but testified that it was with her consent. He introduced a number of witnesses who testified that her reputation for chastity was bad. The principal question was, did the woman consent? Her lack of chastity exerted an important influence upon this question, for the rule is that it is inferable that a courtesan is more likely to consent than a pure woman. Evidence of her unchaste character did more, therefore, than affect her credibility as a witness, for it tended to support the testimony of the accused that she did consent. It affected in a very material manner one of the controlling questions in the case. The court erred in declaring that the evidence was "introduced only for the purpose of affecting her credibility as a witness." Mr. Bishop says: "This offence may be committed as well on a woman unchaste, or a

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common prostitute, as on any other female. In matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented." 2 Bishop Crim. Law (7th ed.), section 1119. "To meet the question of assent," says Mr. Wharton, "it may also be shown that she was a common prostitute, or of loose character." 1 Whart. Crim. Law (8th ed.), section 568. Other authorities declare a similar doctrine. Gillett Crim. Law, section 732, and authorities cited. The rule as we have stated it was recognized in *Anderson v. State*, 104 Ind. 467.

Judgment reversed.

Filed April 27, 1889.

118	527
131	349
131	358

No. 13,379.

HALE v. MATTHEWS.

BILL OF EXCEPTIONS.—*Date of Presentation to Judge.*—*Practice.*—Where the record shows that the bill of exceptions was presented to the judge and filed within the time allowed, the fact that there is no statement in the bill as to the time when it was presented to the judge is not material.

DAMAGES.—*Civil Action.*—*Charge Involving Crime.*—*Proof.*—*Preponderance of Evidence.*—*Reasonable Doubt.*—In an action to recover damages for the destruction of property, which it is alleged the defendant wilfully and unlawfully set fire to, the plaintiff is only required to prove his case by a preponderance of the evidence, and not beyond a reasonable doubt.

SAME.—*Presumption of Innocence.*—*Instruction to Jury.*—While a presumption of innocence attaches to the defendant, and is a proper subject for consideration by the jury, the failure of the court to specifically charge the jury in relation to such presumption does not constitute error where they are instructed generally that the law presumes that every one acts lawfully and honestly.

DEPOSITION.—*Defective Certificate.*—*Return to Officer for Correction.*—Where it

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is discovered after the publication of a deposition that the seal of the officer before whom the same was taken is not attached to his certificate, the court may, although a motion to quash is made, order the deposition to be returned to the officer in order that the omission may be supplied.

SAME.—Time of Filing.—Continuance.—If in such case the deposition be returned, properly certified, during the trial of the cause, and is to be regarded as having been filed as of the date of its return, the opposite party, under section 436, R. S. 1881, is entitled to a continuance, upon a proper motion therefor.

From the Kosciusko Circuit Court.

L. H. Haymond and *L. W. Royse*, for appellant.

J. S. Frazer, *W. D. Frazer*, *H. S. Biggs* and *W. F. Cook*, for appellee.

COFFEY, J.—The complaint in this case avers that on the 19th day of August, 1885, the appellee was the owner of a large quantity of poplar and cherry lumber, of the value of \$925; that on said day the appellant, John B. Hale, at the county of Kosciusko, did then and there unlawfully, purposely and wilfully set fire to, burn and destroy all of said lumber to the damage of the appellee in the sum of \$925.

A demurrer to this complaint, for want of sufficient facts to constitute a cause of action, was overruled and the appellant excepted.

The appellant then answered said complaint by a general denial. The cause, being at issue, was tried by a jury, who returned a verdict for the appellee. Over a motion for a new trial, the court rendered judgment on said verdict.

The appellant assigns as error in this court:

1st. That the circuit court erred in overruling the demurrer to the complaint.

2d. That said court erred in overruling the appellant's motion for a new trial.

As the appellant does not urge the first assignment of error in his brief, the same, under the rules of this court, must be regarded as waived.

Under the second assignment of error it is insisted that the

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court erred in giving instruction number two to the jury. That instruction is substantially as follows :

In determining whether or not the material allegations of the complaint are proven, by a preponderance of the evidence, the jury are to take all the evidence, facts and circumstances proven in the case tending to sustain the material allegations in the complaint, and upon the other hand they are to take all the evidence, facts and circumstances in the case which tend to disprove the truth of the material allegations of the complaint, and if there is more evidence tending to disprove the truth of the complaint than there is to support it, or if it is evenly balanced, then their verdict should be for the defendant; but if there is more evidence tending to prove such allegations in the complaint than tending to disprove the same, although it may be but slight, their verdict must be for the plaintiff.

The argument is, that as the charge against the appellant in the complaint amounts to a charge of arson, he is presumed to be innocent, and that the jury should have been instructed that they should consider such presumption in connection with the evidence in the cause.

This objection is met by the appellee with the contention that the bill of exceptions on file is not a part of the record, and that, therefore, this court can not consider the instruction. This contention is based upon the fact that there is no statement in the bill as to the time at which it was presented to the judge for his signature.

Prior to the passage of our present statute upon this subject, justice was sometimes defeated by a failure to file the bill of exceptions within the time allowed, although such bill had been presented to the judge within the time allowed by the court. There can be no doubt that the object of the Legislature in passing section 629, R. S. 1881, was to prevent a failure of justice on account of the failure of the judge to do his duty, when the bill was presented to him for his signature,

within the time fixed by the order of the court; hence it is now made his duty to note the time when the bill of exceptions is presented to him. But in this case the bill was not only presented in the time allowed, but it was signed and filed within the time. The object of the statute has, therefore, been fully accomplished in this case, and we think the bill of exceptions is a part of the record.

The general rule in civil cases is, that a party having the burden of an issue shall succeed upon that issue, if he can bring to his aid a preponderance of the evidence. We know of no exception to this rule in this State, except in the case of slander, where the defendant justifies the speaking of words which charge the plaintiff with larceny or some other felony.

Many eminent lawyers and jurists have condemned the rule, even in this class of cases, and in the case of *Tucker v. Call*, 45 Ind. 31, an effort was made to induce this court to overrule the decisions holding that, in that class, the defendant was bound to prove his plea of justification beyond a reasonable doubt before he could succeed. But this court, in that case, declined to do so, holding that the rule in this State is firmly established. However firmly the rule in this class of cases may be fixed in our jurisprudence, we are not inclined to extend it to cases to which it has not heretofore been applied.

The instruction in this case is in the usual form used in civil actions, and while it would have been proper for the jury, in making their verdict, to consider the presumption of innocence which attached to the appellant, we do not think that such presumption changed the rule, and required appellee to have more than a preponderance of the evidence to entitle him to recover. The jury were told in another instruction, in substance, that the presumption of law was against wrong-doing, and it is fair to presume that the jury considered this instruction, with the one now under consideration, in making their verdict.

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If the appellant desired that the jury should be more specifically instructed in relation to the presumption of innocence attaching to him, he should have asked the court to do so.

In the case of *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, the authorities upon the question here involved are collected, and the question is decided adversely to the appellant.

It is also objected that the third instruction is erroneous, in being too narrow, but, when taken in connection with the other instructions in the case, we think it correctly states the law.

It is also urged that the court below erred in giving instruction number six. In that instruction the jury were told that the law presumes that all persons are law-abiding, and that they act lawfully and honestly, and that witnesses are truthful and testify truthfully, and that it was their duty to reconcile the facts and the testimony upon that theory if they were able to do so; and if they were satisfied that any person had acted unlawfully it was their duty so to find, and if any witness had testified untruthfully it was their duty to disregard so much of said testimony as they found to be untrue.

That portion of the instruction which informs the jury that the law presumes that every one acts lawfully, evidently has reference to the charge against the defendant, and is a correct enunciation of the law, while the remaining portion of the instruction lays down rules by which the jury may be governed in weighing the testimony and in arriving at a correct conclusion. At all events, the instruction is not materially erroneous. Counsel are in error when they claim that the instruction assumes that there are conflicts in the evidence.

The appellee took the deposition of one Ulysses G. Hale and filed it in the clerk's office some days before the day set for the trial of this cause. After publication of the deposition it was discovered that the notary public before whom it was taken had failed to affix the impress of his seal to the

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certificate. Pending a motion to quash this deposition, on motion of the appellee it was returned by the clerk, by order of the court, to the notary for the impress of his official seal. The deposition was returned while the cause was on trial, the motion to quash it was overruled by the court, and over the objection of the appellant it was read in evidence.

It is now claimed that this proceeding constituted an error for which the judgment below should be reversed. The argument is, that the deposition had not been on file the length of time required by section 436, R. S. 1881, and that the appellant was not, therefore, presumed to be prepared to meet it, and had no opportunity to move for a continuance. We do not think that the contention of the appellant can be sustained. The deposition had been filed in time, was regular in form, and the certificate was sufficient, but the evidence that the person before whom it was taken was a notary public was absent. We think it was in the discretion of the court to order the deposition returned by the clerk of the court to the notary, in order that this omission might be supplied. When the appellant entered upon the trial he did so with knowledge of the fact that the deposition might be returned in time to be read in evidence. If it was necessary that it should be refiled upon its return, and that it is to be regarded as having been filed as of that date, then, by the terms of section 436, R. S. 1881, the appellant was entitled to a continuance at the costs of the appellee, upon good cause shown upon affidavit, if the appellee claimed the right to use it. No application for a continuance was made on this account.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

OLDS, J., did not participate in the decision of this cause.

Filed April 26, 1889.

Stokes v. Anderson et al.

No. 12,704.

STOKES v. ANDERSON ET AL.

WRITTEN INSTRUMENT.—Delivery.—What Does not Constitute.—S. signed a deed, bill of sale and promissory note, and left them upon the table. He neither said nor did anything to indicate an intention to deliver them; on the contrary, the circumstances show that he did not want to execute the writings at that time. He reserved the right to examine them on the next day, and it was agreed that if they were found incorrect, corrections should be made. While the papers were so lying upon the table, one of the persons named therein took them up and gave them to his clerk, with instructions to put them in his vault.

Held, that there was no delivery.

SAME.—Illegal Consideration.—Husband and Wife.—Divorce.—Collusive Agreement to Obtain.—Writings executed by a husband for the benefit of his wife, in pursuance of a collusive agreement between them, whereby the wife is to institute a divorce proceeding for a cause which does not exist, thus abandoning a cause which she claims to exist, and the husband will not resist the proceeding, but will aid in procuring the divorce to be granted, are upon an illegal consideration, and not enforceable.

From the St. Joseph Circuit Court.

W. G. George, A. C. Harris, W. H. Calkins and J. H. Baker, for appellant.

A. Anderson and L. Hubbard, for appellees.

BERKSHIRE, J.—The complaint alleges that the appellant is now, and was on the 6th day of March, 1885, the owner of certain lots in the city of South Bend, and of certain real estate, all in St. Joseph county, State of Indiana, and of the south one-third of lot 114 in the town of Goshen, county of Elkhart, State of Indiana, all of the value of \$9,000, subject to existing encumbrances, and is not, and was not, the owner of any other real estate. On the 6th day of March, 1885, and for twenty-four years theretofore, he was the husband of the appellee Susan M. Stokes, and still is her husband; that he and his said wife had lived together amicably from the time of their marriage until the said date named, that he

118	533
126	66
118	533
155	356
155	500

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knew of no unkind feeling existing between them, and knows of none at this time. At that date she was the owner of real estate in said county of St. Joseph of the value of \$10,000; that his real estate was encumbered to the amount of about \$12,500, and hers to the amount of \$2,700, which was to secure his debt. On the 5th day of March, 1885, the appellant's said wife, with his consent, left their home to spend the day with her aunt, intending to return about 5 o'clock in the evening; that within about four hours after her departure, the appellee Anderson came to the residence of the appellant and informed him that his wife would not return, and intended immediately to apply for a divorce, and that unless he at once made a settlement with said Anderson in behalf of his said wife he should be ruined financially; that said Anderson is the uncle of the appellant's said wife, and has great and undue influence over her, and possessed such influence at the time of said conversation with the appellant; and being ignorant of any grievance on the part of his said wife, appellant has endeavored to communicate with her for the purpose of ascertaining the cause of her abandonment of her home, but has been refused admission to the house of Mrs. Mary Harris, where she is stopping, all of which is the result of the wrongful interference and undue influence of said Anderson. On the said 5th day of March, 1885, having made the statements and threats as stated, and having been the confidential adviser of the appellant, and in whom he had full confidence, the said Anderson caused appellant to accompany him to his law office in said city of South Bend (he being then and now a prominent attorney in said city), and insisted that a divorce must be procured for appellant's wife, and that property arrangements must be made for her benefit; that at said office appellant met the appellee Hubbard, who had been summoned by the said Anderson, and who, appellant was induced to believe, would act as his attorney; that the said Anderson had at that time great influence over the appellant, and said Hubbard was known to

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him as a prominent attorney of said city; that at that time, and for some days theretofore, the said Hubbard was and had been acting as the attorney of the appellant's said wife in conjunction with the said Anderson, under an employment from him, all of which was unknown to the appellant; that, relying upon the representations of the said Anderson, and being in ignorance of the practice and rules of law, he, on the 6th day of March, 1885, signed and delivered to said Anderson, in escrow, his promissory note for \$9,000, without consideration, to be held in anticipation of the granting of a divorce between the appellant and his said wife in an action for divorce which the said Anderson was to cause to be instituted in her name, not as the result of any arrangement between the appellant and his wife, but which said Anderson demanded in her name, professing to act as her attorney; that no opportunity was given the appellant to take counsel as to his legal rights (of which he was wholly ignorant), the said Anderson insisting that matters must be closed up immediately, and demanded that a deed be made by the appellant conveying, in trust for his said wife's benefit, to the appellees Hubbard and Matthews, all of his real estate, and threatened his financial ruin if his (Anderson's) wishes were not complied with; and being unable to consult with counsel, and shocked and dazed by the announcement that had been made to him by said Anderson, that his wife would never return; he did agree, under his command and direction, to execute a deed conveying all of his real estate to the appellees Hubbard and Matthews in trust for his said wife; that his said wife was not present when he signed the said deed; that it was understood that said note and deed should remain in escrow until the next day, when the appellant could further examine the same, and, if not all right, that the proper corrections might be made; that at the same time the said Anderson caused the appellant to execute a bill of sale of all of his household property to his said wife, which was made without consideration, and was not delivered, but with said

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deed and note was left with said Anderson as an escrow, for future examination and ratification by the appellant; that afterwards said Anderson obtained the signature of the appellant's said wife to said deed, and thereafter, without her consent, or his, or that of the appellees Matthews and Hubbard, caused the said deed to be recorded.

The action was put at issue by an answer in denial and submitted to the court for trial, and during the trial the court, in its discretion, permitted the appellees to file a second paragraph of answer, to which the appellant replied in general denial, and the trial proceeded. At the conclusion of the evidence, the court made its finding for the appellees, after which the appellant filed his motion for a new trial, which was overruled by the court and the proper exceptions reserved, and the court rendered judgment for the appellees.

There is but one error assigned, and that is, that the court erred in overruling the motion for a new trial.

After looking into the evidence, as we find it in the record, we summarize the facts, except short quotations, which we copy from the testimony of one or two witnesses:

The appellant and his wife, Susan M. Stokes, who appears as one of the appellees, are now, and had been for twenty-four years immediately preceding March 5th, 1885, husband and wife, and on that day, to all outward appearances, were living together contentedly in the city of South Bend, State of Indiana. At that time Mrs. Stokes had an uncle, a prominent lawyer, residing in said city, Andrew Anderson by name, and who is one of the appellees to this action. Mrs. Stokes also had at the same time an aunt, Mrs. Mary Harris by name, residing in said city, and who had at one time occupied the relation of step-mother to her, her father having died theretofore. Mr. Anderson and Mrs. Harris were brother and sister. On the 4th day of March, 1885, Anderson and Mrs. Harris met at her residence and held a conference as to the domestic affairs of Mrs. Stokes and her husband, and to consider of her welfare; all of which was

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voluntary on their part and unknown to Mrs. Stokes. As the result of the conference, the conclusion was reached to hold an interview with Mrs. Stokes and then determine as to the future. It was agreed that Mrs. Harris should visit Mrs. Stokes at her home on that afternoon and invite her to her (Mrs. Harris') house for dinner the next day; that Anderson should be sent for and Mrs. Stokes' domestic affairs considered further. Pursuant to the arrangement, Mrs. Harris called and spent the afternoon with Mrs. Stokes, and invited her to dine with her (Mrs. Harris) on the next day. At the breakfast table the next morning all was pleasant between Mrs. Stokes and her husband, and she mentioned the invitation she had received from her aunt and asked her husband if she should accept it; he insisted on her doing so, and left home with that understanding, she informing him that she would return by five or half-past that evening, and when she left home intended to do so. Not only had there been no misunderstanding between them that morning, but on the witness-stand Mrs. Stokes was unable to state when there had been a disturbance, and stated that they had not quarrelled in five years; that they never quarrelled.

Mrs. Stokes had hardly arrived at the residence of Mrs. Harris until Mr. Anderson was sent for, and soon after dinner he came. Soon after his arrival he made his mission known to Mrs. Stokes, and began to tell her of her many grievances because of the misconduct of her husband. He talked of the kind of life her husband was leading, and filled her mind and heart full of stories of his unfaithfulness. Reports of escapades of her husband with one Mary Reed, to New York, Niagara Falls and elsewhere, were graphically pictured, and although the many shortcomings of her husband, as related to Mrs. Stokes on that occasion, were communicated as well ascertained facts, it turned out upon the trial that all the information that Mr. Anderson had or possessed came to him as rumors floating around in the air.

As the result of the interview, the now discontented and

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unhappy wife made up her mind not to return to her home and to the bosom of her husband with whom she had lived for twenty-four years, but to at once apply for a divorce, and then and there employed Mr. Anderson as her attorney, giving to him full authority in the premises. From that time, although the appellant made several efforts, he was unable to obtain an interview with his wife, that he might disabuse her mind of the accusations made against him. On the morning of the 6th of March, Mr. Hubbard spoke to Mr. Anderson, at the instance of the appellant, upon that subject, but the request was in most positive terms denied.

Before the 5th of March, and before Mr. Anderson had had any conversation with Mrs. Stokes, but most likely after he had seen Mrs. Harris, and after they had agreed to interview Mrs. Stokes, he spoke to Mr. Hubbard and suggested to him that trouble was brewing between Stokes and his wife, and, in case of a culmination, that he desired his services in her behalf. Immediately after the close of the conference with Mrs. Stokes, Anderson at once repaired to the residence of the unsuspecting appellant and found him at home, and expecting to meet his wife at the appointed time. Anderson had hardly entered the threshold until the appellant was informed that his wife was now advised of his unfaithfulness, and that he (Anderson) had known of appellant's operations for some time, and that Mrs. Stokes would insist on a divorce, and would expect that suitable provision be made by him for her support, and a repayment of the money which he had used belonging to her.

The appellant, dazed and astonished, stated that all this would bring upon him financial ruin, in answer to which he was informed that his credit was all gone anyhow. Anderson further stated that the appellant had been mortgaging his wife's property and that he had got to secure her, and probably by a conveyance of property, and insisted that they at once go to his office, which they did. In the meantime Hubbard was notified to be there in *five minutes*, and arrived

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within that time. After a two hours' consultation at Anderson's office, Anderson and Hubbard, two prominent lawyers, acting on behalf of Mrs. Stokes, and the appellant alone in his own behalf, it was finally agreed that the appellant should execute his note to Anderson, for the benefit of his wife, for the sum of \$9,000, \$5,000 of which she would be entitled to as alimony upon obtaining a divorce, and the other \$4,000 representing different sums of money belonging to her and used in his business, amounting to \$2,000, and for which there was no legal liability, so far as the facts disclosed by the evidence indicate, and sixteen years' interest thereon, less a fraction, amounting to \$2,000 more, the said note to be secured by a trust deed to Hubbard and Matthews; and the said trust deed was to secure the further sum of \$2,700 for which Mrs. Stokes' separate real estate had been mortgaged to secure a debt of her husband. It was further agreed that a bill of sale should be executed by the appellant to his wife for certain of his household property. In return, Hubbard and Matthews were to execute a declaration of trust to the appellant, whereby, upon the payment of said sums of money by him, the said real estate should be reconveyed to him, or in case of its sale, after the payment of the encumbrances upon it, and the encumbrances upon his wife's real estate and the \$9,000 note, he was to have the surplus, and Anderson was to have Mrs. Stokes execute to the appellant a release of all liability for her support. With this understanding the parties separated until the next evening at half-past seven o'clock. At this interview, Anderson accused the appellant of adultery with Mrs. Reed; with having been off to Niagara Falls and elsewhere with her; with using too much intoxicating liquors, and spoke of an extravagant champagne bill; he further stated that Mrs. Stokes had been neglected and that she proposed to have a divorce.

The appellant showed no inclination to resist what Anderson said as to Mrs. Stokes' intention. In this conversation it

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was stated that appellant ought to pay the expenses of the divorce proceedings by Mrs. Stokes, including Mr. Hubbard's fee as her attorney, which would be \$50. Appellant stated that he and Hubbard could arrange that outside, to which Hubbard acceded.

Hubbard, in his testimony, states that Anderson stated, and repeated it on that occasion, that Hubbard had been retained and was acting as the attorney of Mrs. Stokes, but at the same time states that the appellant may not have so understood it, from the fact that soon after the parties came together on the evening of the 6th, he called him out and wanted him to advise with him as his attorney.

The appellant states that he supposed Hubbard was acting for him, and is to some extent corroborated by the circumstance that he had no attorney present on the evening of the 6th, and the further circumstance that he went to Hubbard on the morning of the 6th to get him to intercede with Anderson for an interview with Mrs. Stokes.

At the same time it is not to be forgotten in this connection, that Anderson states that in the interview with Stokes on the 5th, at his house, he told him that he had retained Hubbard for Mrs. Stokes.

After the parties came together on the evening of the 6th, Anderson made known to the appellant that the rate of interest which his note was to bear for the first two years must be changed from three to four per cent., as had been before agreed upon, and that Mrs. Stokes was not satisfied with the amount of household property she was to get, but that she must have it all except some articles that had belonged to the appellant's mother, and some pictures he had brought from California.

Finally, after the papers which Anderson desired executed by the appellant had been put in proper form, and containing the conditions and terms he demanded, he requested the appellant to execute them, but the appellant hesitated, and read and re-read them; he made some suggestions as to

the declaration of the trust, and some changes were made; he several times asked for time until the next day to consider of the matter, but Anderson was urgent.

We quote a portion of the testimony, as given by Hubbard, as to what took place on that occasion: "It got to be past ten o'clock, and Mr. Stokes would read over and over the papers, and he suggested this difficulty and that, and additions were made to the declaration of trust; of course nothing was added to the deed after Anderson got in the description of the Elkhart county property, which he got of Mr. Stokes. We made repeated additions to the declaration of trust; that was the main thing; still Mr. Stokes hesitated; he read it over and over, and he says to me: 'Don't you think I ought to take more time than this?' I said, 'I see no reason, Mr. Stokes; if you understand it you may as well close it up.' Anderson was busy with somebody else while he and I did stay for an hour or so in Anderson's room. We went in there because it was more private. He came in—it must have been after ten when he came in; Stokes was still hesitating, although the papers were finished; he was suggesting this and that; after it was closed up and there was nothing more, Anderson says: 'Are you ready,' or 'Is it done,' or something of that kind. 'Well,' Mr. Stokes said, 'I do not know as I understand.' Well, Mr. Anderson took up the thing and read that, and said: 'You understand that, don't you? that is a promissory note for \$9,000,' and read it over. 'Yes, sir,' Stokes said. He read over the deed, and said: 'Now, you understand that, don't you?' Stokes said: 'Yes, sir.' He read over the declaration of trust. 'Now,' he says, 'you are a business man; you understand this; you understand the effect of it, don't you?' 'Yes, sir.' Well, Stokes still hesitated. He stood there with a pen in his hand, and kept hesitating, and it got late, and Anderson said: 'This thing must be closed up to-night.' Stokes said: 'I guess I had better take more time to look it over.' Anderson said: 'No, you understand it; if you put it off you will be no

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nearer to-morrow than you are to-day.' By and by he got a little impatient, and said: 'This thing must be closed up to-night; come, close it up, Stokes; if you understand it, go on and sign it.' Stokes kept on hesitating, and Anderson got more impatient, and showed his impatience in his manner of speaking. He said: 'Now, if you don't close it up to-night I will sue you before to-morrow morning; this thing has got to come to an end, else I will sue by seven o'clock.' That statement was made more than once in that language. Stokes still hesitated, and we had considerable conversation. By and by he took the pen very reluctantly and went to work and signed all the papers, and they were passed over, of course. That sort of talk was of a half-hour's duration."

The witness further states that when Anderson spoke of suing the appellant he spoke in a threatening manner. The appellant spoke about wanting more time to look the papers over, and Anderson told him he could come in the next day and look them over as often as he wanted to, and if there was anything wrong it should be corrected. Anderson says that this statement only applied to the declaration of trust.

Hubbard further testified. We quote from his testimony: "The deed, when we got through with it, and its execution was acknowledged, laid there on the table in Matthews' room before us, and I think Wiley took it in the other room. My impression was that he took it in there to put a seal upon it, or something, and Wiley came up and had something to do with it. The papers all lay there; that deed had to be recorded in both counties, Elkhart and St. Joseph, and I said to Mr. Anderson, 'will you take charge of this and see to its recording?'"

We quote further from the testimony of this witness: "I say when we got through signing the papers they lay on the table; it was in Matthews' room. When the papers were gathered up I spoke to Mr. Anderson to take care of the deed. I was the grantee in it, and I asked him to take charge of it and see to the recording of it. I knew that there

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was some expense attending that and I wanted him to run that part of it."

Anderson testified, and we quote from his evidence: "I told him (Stokes) he knew very well whether he could trust us or not, but the matter had to be settled that evening, so he stepped up to the desk and signed the note, deed and bill of sale, and I think he signed the declaration of trust. Mr. Hubbard signed the declaration of trust also. I called in Mr. Wiley out of the other room, he being a notary public. Mr. Stokes then acknowledged the deed before him. Mr. Wiley was my clerk. I took the deed, note, bill of sale and declaration of trust, and I think put them in an envelope, handed them to Mr. Wiley and told him to put them in the vault, and so ended the interview."

Anderson further states, and he is not contradicted by any one, that Wiley did not put his certificate or seal to the deed until the morning of the 7th. Matthews was not present on the evening of the 6th. He signed the declaration of trust on the morning of the 7th, but gave no direction as to its delivery. He at no time accepted the deed of trust or authorized its acceptance, further than what is implied from agreeing in advance of the execution of the papers to accept the trust and the execution thereafter of the declaration of trust.

The appellant testified as follows as to the signing of the papers: "I picked up the pen and hesitated about signing them. Mr. Anderson said, if my memory serves me right, 'Sign them,' or 'Sign and get through with them.' I think he only said 'Sign them.' He called Mr. Wiley in and asked him something about taking the acknowledgment of the deed. I was not acquainted with Mr. Wiley, neither did I have any conversation with Mr. Wiley that evening, nor did I see him sign his name that evening. Mr. Anderson picked up off of the table the papers and handed them to Mr. Wiley. I said to Mr. Anderson, 'I will come up and look them over in the morning.'"

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The value of the appellant's real estate at the outside was about \$17,000. It was encumbered to the amount of \$12,000 when the trust deed was signed on March 6th. If we add \$9,000, the amount of the note executed to Anderson, and \$2,700, the amount of the encumbrance on Mrs. Stokes' real estate, we have \$23,700. The appellant had outside debts to the amount of \$2,000. This would make his total liabilities about \$25,700.

There had been put into the Mishawaka property by the appellant about \$15,000. This seems to have been a property of uncertain value. If we suppose this property to have been worth \$15,000, the value of the entire estate belonging to the appellant was, on March 6th, 1885, \$32,000; deduct therefrom \$25,700, and the balance is \$6,300.

This was substantially financial ruin, for no one could convert the property and pay the liabilities. We apprehend that it would have been difficult to have found a responsible person who would have taken the property and assumed the liabilities.

A clearer case of conspiracy to separate and divorce husband and wife, and to financially ruin the husband, will rarely be found than is made out by the evidence in the case under consideration. Indeed, there seems to have been no effort to cover up or conceal the purpose. But the trouble is, the complaint fails to charge a conspiracy, and no relief can be afforded on that ground.

The appellant was not threatened with great bodily harm, nor with a criminal prosecution, and therefore was not under duress such as is recognized by the law, and can obtain no relief on that ground, although we are satisfied that the pressure that he was placed under was about as effectual as though force or criminal prosecution had been threatened.

A further question for consideration is, whether or not the deed, note and bill of sale which the appellant signed were ever delivered so as to impart to them validity as executed writings. And notwithstanding there is no conspiracy charged:

in the complaint, and no such duress proven as the law will recognize, yet in determining whether or not the writings in question were delivered, all the circumstances are to be considered. In *Weber v. Christen*, 121 Ill. 91 (2 Am. St. R. 68), the learned judge delivering the opinion says: "We think, however, that the crucial test, in all cases, is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done. The intent, of course, is to be gathered from the conduct of the parties, particularly the grantor, and all the surrounding circumstances." We quote the last sentence again and emphasize it: "*The intent, of course, is to be gathered from the conduct of the parties, particularly the grantor, and all the surrounding circumstances.*" This language comes with much force when we remember the circumstances under which the appellant signed the writings in question. We quote further from this opinion: "Act and intention are the two elements or conditions essential to a delivery. The act may, as we have just seen, be a manual transfer of the instrument, with or without words, or it may be a purely verbal act, as, where the grantee is simply directed to go and get the deed already prepared for him."

The oral negotiations between Anderson, Hubbard and the appellant culminated on the night of the 5th of March in an agreement that the appellant would execute to Hubbard and Matthews a deed of trust for all of his real estate, a bill of sale to his wife for certain of his household property, a promissory note, for his wife's benefit, to Anderson for \$9,000, and in return Hubbard and Matthews were to execute a declaration of trust, and Mrs. Stokes a release to the appellant of all liability for her future support, which Anderson was to guarantee. These were to be concurrent acts. When Anderson, Hubbard and the appellant met at the appointed time and place, Mrs. Stokes was not there, nor was Matthews. No written release from Mrs. Stokes had been

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executed, and Matthews had not executed the declaration of trust, and it was not pretended that anything of the kind would be done until the next day. Indeed, the appellant was expressly told that he must execute the writings which he was to execute, on that evening, and trust to promises for the writings that were to be executed to him.

It would hardly be expected that a sane man, acting of his own free will, in view of the circumstances immediately preceding, and the treatment that he had received, would execute conveyances and obligations, which sooner or later would result in his financial ruin, and accept verbal promises from those who had brought his troubles upon him that they would at a future time comply with their part of the agreement and execute the writings which were for his benefit, and to be executed contemporaneously with his, and the sequel shows that he did not. It is true he signed the deed, the note and the bill of sale, but under what circumstances? The evidence, as we have set it out, discloses. The appellant pleaded for time. Anderson insisted that he understood the writings. Stokes hesitated and asked for time. Anderson was urgent, and said to the appellant that if he put the matter off until to-morrow, he would be no nearer ready than to-day. Anderson became impatient, and Stokes still hesitated. Finally Anderson displayed his impatience, and said to the appellant that he must close the matter that night or he would sue him the next morning by 7 o'clock. Appellant still hesitated, but finally reluctantly took the pen and signed the papers. This was about 11 o'clock in the evening. Although the appellant signed the papers, the circumstances show that he did so against his will and desire, and that he did nothing more than the pressure brought to bear upon him compelled him to do. There is no evidence tending to show any intention on the appellant's part to deliver the papers, and the circumstances all rebut any such intention. He was not pressed to deliver the papers, and therefore said nothing and did nothing in that direction.

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Nothing was said or done to indicate that the appellant desired that the papers pass from under his control. He signed them and left them on the table, said nothing and did nothing to indicate what should be done with them. Anderson, anxious to get control of them, picked them up, passed them to his clerk, and by him they were put into the vault. This was not a delivery. We quote from a note in 1 Sheppard's Touchstone, on page 58: "But if a man throws a writing on a table and says nothing, and the party takes it, this does not amount to a delivery, unless it be found to have been put there with intent to be delivered to the party."

We quote from *Hughes v. Easten*, 4 J. J. Marshall, 572 (20 Am. Dec. 230): "But simply proving, as in this case, that the deed was signed and attested and left on the table without a delivery to any person, and in the absence of the donee, would not be sufficient evidence of a delivery. Signing and sealing a deed, give it no effect without a delivery."

In *Chadwick v. Webber*, 3 Greenl. 141 (14 Am. Dec. 222), the tenants claimed under Jeremiah Webber, a son of Charles, by virtue of a deed of the lands alleged to have been given by Charles to Jeremiah. Charles and Jeremiah were partners in trade. In 1809 Charles went before a notary, in the absence of Jeremiah, and acknowledged his deed to the premises in question to Jeremiah for the expressed consideration of four thousand dollars. Jeremiah had drawn up the deed. In 1814 certain other deeds were executed by Charles in the presence of his son and of witnesses; the deeds were all in the son's handwriting, and after they had been executed they were wrapped in a piece of brown paper and deposited by the son in a trunk, where the partnership papers were kept, and to which the father alone had the key. These deeds and the deed of 1809 were found in the father's desk on his decease, and upon the wrapper was written: "Charles Webber's deed to his son, not to be opened till after his death." The court said: "A delivery of a deed may be by acts or by words or by both. It may be

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delivered by the party, who made it; or by any other person, by his appointment or authority precedent, or assent subsequent. It may be made, either to the grantee, or to any other person authorized by him to receive it; or to a stranger for his use and benefit. But if a man throws a writing on a table, and the party takes it, this does not amount to a delivery, unless it be found to have been put there, with intent to be delivered to the party. Com. Dig. Fait (A 4). And, upon the same principle, if the maker of a deed avails himself of the hand of the party for whom it is made, merely to put the deed into a trunk, desk, or other place of deposit, within the control of the maker, and such purpose is indicated and made known at the time, there is no legal delivery; no act being done, or declaration made, of an intention to deliver."

We quote and emphasize a part of what is stated in the above quotation, because of its applicability to the case under consideration: "*But if a man throws a writing on a table, and the party takes it, this does not amount to a delivery, unless it be found to have been put there, with intent to be delivered to the party.*" The appellant left the deed upon the table. He said nothing and did nothing to indicate that he intended to deliver it. All the circumstances show that it was contrary to his wish to execute the deed, and so with the other papers. After they had been signed, Anderson, of his own accord, stepped forward and picked them up, handed them to his clerk and told him to put them in the vault. The mere lodgment of a deed in a place to which the grantee has access is not a delivery. *Huey v. Huey*, 65 Mo. 689.

We quote from *Mills v. Gore*, 20 Pick. 28: "Jonathan D. Wheeler, one of the attesting witnesses to the execution of the deed, testifies that he saw Gore sign the deed, and that he and Luke Harrington subscribed their names as witnesses; that Gore, who was standing by the side of Mills at a desk, took up the deed after signing it, put it before Mills on the desk, and remarked, 'There is no go back from that;' that this was before Wheeler and Harrington had subscribed

their names as witnesses; that soon after subscribing his name, he (Wheeler) left the counting-room, leaving Mills and Gore writing, and the deed remaining on the desk before them. Luke Harrington, the other subscribing witness, testifies to substantially the same facts. * * This evidence, unexplained, would undoubtedly be sufficient proof of a delivery; and so would be the possession of the deed by Mills alone, if unaccounted for, be good *prima facie* evidence of a delivery. But the question in this case is not, whether the plaintiffs have produced sufficient *prima facie* or presumptive proof of a delivery, but whether the plaintiffs have proved the fact by direct testimony. There is no proof of the delivery of the deed into the hands of Mills; but a deed may be delivered to a party by words without any act of delivery; as if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, go and take up the writing, it is sufficient for you, or it will serve the turn, or take it as my deed, or the like words, is a sufficient delivery. Co. Lit. 36; Com. Dig. Fait, A 3; 4 Stark. Ev. 477. If however a party throws a writing on a table and says nothing, and the other party takes it up, this does not amount to a delivery, unless it be found to be put there with the intent to be delivered to the party, or to be taken up by him. Com. Dig. Fait, A 4; *Chamberlain and Staunton's Case*, 1 Leon. 140. Admitting these principles, which seem to be well established, we are of opinion that the evidence on the part of the plaintiffs is not sufficient to prove a delivery of the deed and note to them. The words used by Gore, when he placed the deed on the desk, do not indicate an intention to deliver the deed at that time; they only manifest the intention of completing the contract of sale, but not of delivering the deed before he received H. D.'s note; and there can be no reasonable presumption that he ever intended to deliver the deed before he received the note."

We quote from *Woodman v. Coolbroth*, 7 Greenl. 181, side page (syll.): "Where the parties to a deed were both pres-

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ent at the time of its execution, and the grantor was bound by his previous contract to make the deed, yet the grantee having taken it up and carried it away without the consent of the grantor, this was held to be no delivery of the deed." See *Woodbury v. Fisher*, 20 Ind. 387; *Dearmond v. Dearmond*, 10 Ind. 191; *Tharp v. Jarrell*, 66 Ind. 52; *Jones v. Loveless*, 99 Ind. 317.

Another circumstance which is not to be overlooked in this connection is, that the appellant was to have the privilege of returning to Anderson's office on the next day after he signed the papers to examine them, and, if they were found to be incorrect, proper corrections were to be made. Hubbard and the appellant state that this was a condition applicable to all of the papers. Anderson limits it to the declaration of trust. But whether applicable to all or to a part, the right to an examination on the next day was reserved, and if the papers, or paper, to be examined were, or was, found to be incorrect, the proper corrections were to be made.

From the evidence, as we have it before us in the record, the papers in question were never delivered. We do not reach this conclusion upon the weight of the evidence, but as a legal conclusion arising from all the evidence in the record.

Another question presented by the record, and the last one which we shall consider, is as to whether there was any valid or legal consideration passing to the appellant for the deed, promissory note and bill of sale. Upon this question a great deal need not be said. As is already disclosed, the appellant and his wife were living together as they had lived for twenty-four years, without any thought of separation or of legal proceedings on her part to obtain a divorce and alimony. But after an interview with her uncle and aunt Mrs. Stokes makes up her mind that there must be a dissolution of the marriage relation existing between herself and husband, and provision made by him for her support in the

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future, and the services of the uncle are engaged and the whole matter is entrusted to him.

Mr. Anderson at once informs the appellant what has been determined upon, and that in the action for divorce the charge of infidelity will be relied on. A settlement as to alimony is demanded in advance, and the amount claimed is \$5,000. Afterwards the appellant is informed by Mrs. Stokes' legal advisers that the action for divorce is a foregone conclusion, and that no adjustment can be made that will avert it, but as to the costs which will accrue, and her attorney's fees, there may be some arrangement made.

Finally an adjustment is agreed upon. The appellant is to secure in advance the sum of \$5,000 as alimony, pay the costs and the plaintiff's attorney's fees in the divorce case, and the amount that he shall pay to her attorney is agreed upon, and instead of bringing a charge of infidelity against the appellant he is to be charged with a failure to provide for his wife. And one of her attorneys, her principal adviser, suggests that he will talk with the judge of the court in which the divorce proceedings are to be instituted, and relate to him the circumstances, and ascertain if he can the probability of securing the divorce on the ground proposed. And it is agreed further that Mr. Hubbard is to have the management and control of the divorce proceedings, and an agreement is made with him as to the fee to be paid. This was a mere collusive agreement between husband and wife, whereby the wife was to obtain a divorce from her husband. The agreement in effect was, that Mrs. Stokes would ignore the cause of divorce which actually existed, as she claimed, and allege another, upon which she did not in fact rely; that her husband would make no resistance to the action, but would aid in bringing about the desired result by agreeing to pay the costs and the fee of her attorney.

The principal matter, under the arrangement, was the dissolution of the marriage, and incidental thereto the settle-

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ment that was made, including the writings which are involved in this action.

The entire transaction was one which was against public policy, and therefore the consideration for the signing and delivering of the writings was illegal. As the writings rest upon an illegal consideration, the courts will not recognize or enforce them.

The case of *Dutton v. Dutton*, 30 Ind. 452, is not a parallel case to the one under consideration. In that case an action was pending by the wife against the husband for a divorce, and on the day the judgment and decree was entered of record, and immediately preceding, an agreement was made that the amount of the recovery on account of alimony should be \$1,000, to be paid by the conveyance to the wife of a certain tract of land, the husband to pay the costs and the wife's attorney's fee. After the decree had been recorded, the husband, in payment of the judgment, executed the conveyance. Under the arrangement the conveyance was as complete a payment of the judgment as though it had been paid in money, and it was unimportant whether the original agreement was, or was not, illegal.

That a contract made between husband and wife, in view of separation, and fully executed by the husband, fair and equitable between the parties, will be upheld, as ruled in the foregoing case, does not conflict with the conclusion we have reached. It may be that if an action for divorce is pending, or if, in anticipation of such an action, the parties meet and agree upon the amount of alimony to be allowed to the wife in case a divorce is granted, and the arrangement is just and equitable, and confined strictly to the matter of alimony, it will be sustained. But if the agreement is broader in its terms, and its tendency is to interest the husband in procuring a divorce or in foregoing resistance to an effort by his wife to that end, then it is contrary to public policy, and is void. *Everhart v. Puckett*, 73 Ind. 409; *Muckenbarg v. Holler*, 29 Ind. 139; *Viser v. Bertrand*, 14 Ark. 267; *Adams*.

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v. *Adams*, 25 Minn. 72; *Sayles v. Sayles*, 21 N. H. 312 (53 Am. Dec. 208).

We quote from the last case: "The cases cited, show with what strictness and care the law guards and upholds the marriage relations; and that no contract, having for its object their dissolution, or calculated to disturb them, can be sustained. In this State at least, a separation *a vinculo*, can only be effected through a decree of the courts of law. No agreement of the parties can have that effect. Sound policy as well as established law forbids it, and any agreement made in fraud of the purposes of the law, and against its policy, is illegal and void." Bishop Mar. & Div., section 635 *et seq.*; 1 Bishop Married Women, section 760; *Speck v. Dausman*, 7 Mo. App. 165.

The judgment is reversed, with costs.

MITCHELL, J., took no part in the decision of this case.

Filed May 7, 1889.

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No. 13,724.

THE STATE, EX REL. WILCOX, v. JACKSON ET AL.

DRAINAGE.—City.—Establishment of Ditch in.—Jurisdiction.—Collateral Attack.—The jurisdiction of the circuit court to establish a ditch, under the drainage law of 1881, partly within the limits of an incorporated city, and levy benefit assessments upon city property, can not be questioned by a property-owner in a suit to collect an assessment.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.

R. B. Beauchamp, for appellees.

OLDS, J.—This is an action to collect an assessment made

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upon the lands of the appellees situate in the town, now city, of Tipton, in Tipton county, for the construction of a drain under the provisions of the drainage law of 1881.

A petition was regularly filed in the circuit court of Tipton county, and such proceedings were had as that assessments of benefits were made and confirmed and the ditch ordered and constructed according to the provisions of the act of 1881, and this action is brought to collect the assessment made against the lands of the appellees. The complaint is in proper form, and no question is presented as to its sufficiency. The appellees' answer, alleges that the lands owned by them and assessed are situated within the corporate limits of the city of Tipton, and that the greater part of said ditch is located and constructed within the corporate limits of said city ; that a portion of said ditch runs through vacant lands adjoining the city, but the commencement and terminus of the ditch are within the city limits, and that the petition and all the proceedings in said cause described said ditch as commencing and terminating within the city limits and running through the city, except a portion which runs through adjacent lands, and that the property assessed for its construction was within the city limits. A demurrer was filed to the answer by appellant, which was overruled and exceptions taken to the ruling, and the ruling on the demurrer is assigned as error. It is contended by counsel for appellees that the court had no jurisdiction to order and construct a drain located as the drain in question, part of it being within the corporate limits of an incorporated city or town, and assess city or town property for the construction of the same, and that the proceedings of the circuit court in approving the assessments and establishing and ordering the construction of the drain were void. Counsel cite, in support of this theory, the case of *Anderson v. Endicutt*, 101 Ind. 539.

The circuit court is not only a court of general jurisdiction, but, by the act of 1881, under which the drain in question was constructed, it was given exclusive jurisdiction of drain-

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age proceedings prosecuted under said act. Upon the presentation of a petition for the construction of a drain, the court had jurisdiction of the cause and authority to determine what property was subject to assessment for the construction of the ditch, and the judgment, although erroneous, would be binding upon all persons properly in court in such cause.

The petition was filed for the construction of the drain in question in this case; notice was given of the pendency of the proceedings as required by law; no appearance was made by appellees, and the court took jurisdiction and established the ditch, confirmed the assessments, ordered and constructed the ditch. After the ditch is constructed and suit is brought in this case for the collection of the assessment of benefits against the property of the appellees, they seek to question the jurisdiction of the court in the proceeding for the establishment and construction of the ditch.

The jurisdiction of the court can not be attacked in this case. The jurisdiction of the court can not be attacked collaterally, as is sought to be done in this case. *State v. Wenzel*, 77 Ind. 428.

In the case of *Anderson v. Endicutt*, *supra*, the question of jurisdiction was presented in the original case.

The court erred in overruling the demurrer to the answer.

Judgment reversed, at costs of appellees, with instructions to sustain the demurrer to appellees' answer, and for further proceedings not inconsistent with this opinion.

Filed May 7, 1889.

No. 13,481.

PEDEN v. MAIL.

SET-OFF.—*May be Replied.*—A set-off may be pleaded to a set-off.

PLEADING.—*Bill of Particulars.*—Where a bill of particulars is necessary to inform the adverse party of the nature of a claim set up in a pleading, the bill must be filed or the pleading will be bad on demurrer.

SAME.—*Reply.*—*Demurrer to.*—*Form.*—A demurrer to a reply, assigning as cause that "the reply does not state facts sufficient to constitute a good reply to the defendant's answer to which it is directed," does not comply with the statute (section 357, R. S. 1881), and is bad.

SAME.—*Complaint.*—*Arrest of Judgment.*—Where the complaint contains one good paragraph, a motion in arrest of judgment will not lie.

SAME.—*Objection to Evidence.*—*Setting Aside Verdict.*—A party can not challenge the sufficiency of a pleading by objecting to evidence or by a motion to set set aside the verdict.

SAME.—*Sufficiency of Complaint.*—A complaint which entitles the plaintiff to some relief is sufficient on demurrer.

From the Owen Circuit Court.

G. W. Grubbs, D. E. Beem and W. Hickam, for appellant.

J. C. Robinson, I. H. Fowler, S. O. Pickens and W. A. Pickens, for appellee.

ELLIOTT, C. J.—The first paragraph of the appellee's complaint is a common count for work and labor performed at the request of the appellant. The second counts upon a special contract, and thus pleads the contract: That it was agreed that the plaintiff should reside upon the defendant's farm during the continuance of the partnership between them; that he should put into the partnership business stock and domestic animals owned by him, and such money as he desired to invest; that he should receive interest on the money invested by him so long as it was used in the business; that the defendant was to put into the business such cattle as he saw fit, and to furnish the plaintiff all the money required to successfully carry on the business, on which

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money he was to receive interest ; that the plaintiff should keep the farm in ordinary repair, and that the defendant should make all the necessary permanent improvements ; that the partnership should continue from year to year, beginning on the first of March, 1882 ; that upon the dissolution of the partnership, the profits of the business should be equally divided, and the losses, if any, should be borne in equal proportions. This paragraph of the complaint further alleges that the plaintiff fully performed his part of the contract. It alleges, also, that the defendant failed to perform his part of the contract, in these particulars: He failed to build necessary fences ; he sold part of the farm ; he took possession of the property of the partnership on the 6th of October, 1884, converted it to his own use and refuses to account for it. It further alleges that the defendant is indebted to the plaintiff, by reason of his breach of the contract and appropriation of the partnership property, in the sum of two thousand dollars. The first paragraph of appellant's answer is the general denial ; the second is a plea of payment ; the third and fourth both plead a set-off ; the fifth counts upon a written contract, and avers that it constituted the only contract between the parties. The fifth paragraph also alleges that, on the 19th day of January, 1883, the plaintiff and defendant had a full and final settlement of all their partnership and individual transactions ; that by the settlement and accounting it was ascertained and determined that the defendant was indebted to the plaintiff in the sum of five hundred and ninety-eight dollars, and that it was on the basis of this accounting and settlement that the written contract was executed ; that, on the 19th day of January, 1884, they had a full and final accounting, wherein it was ascertained and agreed that the stock on hand belonged to the defendant, and was of the value of two thousand one hundred and ninety-eight dollars ; that the plaintiff cultivated the farm during the year 1884 ; that the defendant has received from the sale of stock two thousand one hundred

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and forty-eight dollars, and that the plaintiff sold stock to the value of four hundred and thirty-four dollars, and appropriated the proceeds to his own use; that the partnership was dissolved by mutual consent on the 10th day of October, 1884, and that the plaintiff is indebted to the defendant in the sum of four hundred dollars. The third paragraph of the reply is addressed to the fourth and fifth paragraphs of the answer, and avers that the defendant is indebted to him in the sum of five thousand dollars, which is due and unpaid, and that a bill of particulars is filed. The fourth paragraph of the reply is directed to the third and fourth paragraphs of the answer, and alleges that there was a mistake in the accounting, and states the nature and particulars of the mistake. The fifth paragraph is addressed to particular items of the appellant's set-off.

A set-off may be pleaded to a set-off. If the third paragraph of the reply does sufficiently plead a set-off, it is good. It does sufficiently plead a set-off unless the absence of a bill of particulars makes it bad. No bill of particulars was filed with the reply, and under the authorities this would make the paragraph insufficient upon demurrer, since without such a bill there is nothing in the pleading to inform the defendant of the nature of the claim. The general allegation of indebtedness is not sufficient. *Wolf v. Schofield*, 38 Ind. 175; *City of Connersville v. Connersville, etc., Co.*, 86 Ind. 235. Ordinarily the remedy for uncertainty is by motion, but there are cases where the defect may be reached by demurrer, and this is one of them. If, therefore, the demurrer is sufficient to properly challenge the reply, it must go down. But it is not everything called a demurrer that is a demurrer. The law declares what a demurrer to a reply shall be, and what causes it shall assign. A party who will not obey the command of the law in drawing his demurrer has no just reason to complain if the courts decline to sustain it. The cause assigned for demurrer is, that "the reply does not state facts sufficient to constitute a good reply to the defendant's answer to which

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it is directed." There is no such cause of demurrer recognized by the code, for it provides that the cause for demurrer shall be "that the facts stated therein are not sufficient to avoid the paragraph of answer." Section 357, R. S. 1881. The decisions and the statute condemn the demurrer of appellant. *Lane v. State*, 7 Ind. 426; *Tenbrook v. Brown*, 17 Ind. 410; *Gordon v. Swift*, 39 Ind. 212; *Reed v. Higgins*, 86 Ind. 143; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121; *Grubbs v. King*, 117 Ind. 243. It is not just to permit a party who will not conform to a plain provision of the code to impose upon the courts the burden of aiding a defective demurrer. It would be quite as proper for them to set to work to aid a defective answer or complaint as to supply defects in a demurrer, where the defects are such as to constitute a radical departure from the requirements of the statute.

What we have said of the demurrer to the third paragraph of the reply disposes of the demurrers to the fourth and fifth paragraphs. The result is that there is no valid demurrer to the reply in the record, and, therefore, no pleading is challenged by demurrer.

There is certainly one good paragraph in the complaint, and consequently the motion in arrest of judgment was properly overruled.

The question whether the court did right or wrong in submitting the cause to a jury is not properly in the record. It is not shown that it was done over the objection and exception of the defendant, nor is the question presented in the motion for a new trial. The presumption is that the trial court did right. A party who seeks a reversal must affirmatively show prejudicial error, and that the question was duly presented to the trial court.

The second paragraph of the complaint entitled the appellee to some relief, and is, therefore, sufficient to repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5. But there was no assault upon it by demurrer, and the question here presented is as to its sufficiency after verdict. That it is sufficient we

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have no doubt. It was not error for the court to admit evidence under that paragraph, nor to render judgment upon it. A party can not challenge the sufficiency of a pleading by objecting to evidence or by a motion to set aside the verdict.

The evidence sustains the verdict, and the judgment is right on the substantial merits of the case.

Judgment affirmed.

Filed March 8, 1889; petition for a rehearing overruled May 7, 1889.

118	560
127	470

118	560
130	480

No. 13,523.

PEDEN v. MAIL.

MALICIOUS PROSECUTION.—*Motive.*—*Probable Cause.*—*Evidence.*—Upon the trial of an action for malicious prosecution, it is competent for the plaintiff to introduce in evidence the pleadings in a civil suit commenced by him against the defendant shortly before the criminal prosecution was instituted, as bearing upon the question of probable cause.

SAME.—*Knowledge of Accused's Good Faith.*—A letter written by the plaintiff to the defendant, prior to the institution by the latter of the criminal prosecution against the former, tending to charge the defendant with knowledge that the plaintiff was acting in good faith and under a claim of right in the transaction for which he was prosecuted, is admissible.

SAME.—*Partnership.*—*Account Books.*—*Erasures.*—*Inspection by Jury.*—Where a partner, claiming that his copartner is indebted to him on partnership account, sells property which he claims to belong to the firm and appropriates the proceeds to his own use, for which he is prosecuted criminally by his copartner, he has a right, in an action by him for malicious prosecution, to have the partnership books, in which he asserts that the defendant has made changes and erasures, exhibited in evidence for the inspection of the jury.

SAME.—*Partnership Property.*—*When Partner May Sell and Appropriate Proceeds.*—Where one partner is indebted to his copartner, the latter has the

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right to sell partnership property and appropriate the proceeds to his own use in satisfaction of the debt.

SAME.—Excessive Damages.—Where it appears that the jury, in assessing the damages in an action for malicious prosecution, arrived at the amount deliberately, without the intervention of passion, partiality or prejudice, their verdict will not be disturbed as excessive.

From the Owen Circuit Court.

D. E. Beem, W. Hickam and G. W. Grubbs, for appellant.

I. H. Fowler, S. O. Pickens, W. A. Pickens and J. C. Robinson, for appellee.

MITCHELL, J.—This action was commenced by Frederick B. Mail against Thomas A. Peden to recover damages alleged to have resulted to the plaintiff by reason of a criminal prosecution, which it is charged the defendant maliciously and without probable cause instituted and caused to be prosecuted against him.

It appeared that Peden owned a large farm in Greene county, and that he formed a copartnership with Mail in the fall of 1881, in pursuance of which the latter moved on the Greene county farm in the spring of 1882. At the time the agreement was entered into each owned certain live stock, which it was agreed should be put into the partnership as firm property, and Peden was to furnish money with which to purchase other stock for the firm. He was to have his money back, with interest, and the profits were to be divided equally. Some differences arose between the parties, and on January 1st, 1883, a new agreement was signed.

Peden claimed that by the terms of this last agreement he became the owner of the stock, and that he had the exclusive right to make sales, while Mail insisted that the partnership in the stock continued as before, and that the effect of the new agreement was nothing more than to give the former a lien on all the stock to secure him for advances of money theretofore made by him. While this last agreement was in force, and under the claim that Peden was indebted to him

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on partnership account, Mail sold seven steers owned as above and appropriated the money. After learning of the sale, Peden demanded the money, which Mail refused to pay over. Under his claim of exclusive ownership, the former then drove off all of the stock which remained, which was of the value of about \$1,500. Thereupon Mail instituted a civil suit against Peden in the Owen Circuit Court for an accounting, claiming that the latter was indebted to him in a large sum. He afterwards recovered a judgment for some \$1,300.

In a few days after the civil suit had been commenced by Mail, Peden consulted the prosecuting attorney, upon whose advice, as he claims, he afterwards instituted a criminal prosecution against Mail, charging him in one count with the larceny of the seven head of cattle sold as above mentioned, and in another count with embezzling the money arising from the sale. After a trial Mail was acquitted.

Upon evidence tending to prove facts of which the foregoing presents but a brief summary, the plaintiff below recovered a judgment, from which this appeal is prosecuted.

The appellant complains that the court admitted in evidence the pleadings in the civil suit instituted by the plaintiff against him a short time prior to the commencement of the criminal prosecution which gave occasion for this suit. There was no error in admitting these in evidence. It was a part of the plaintiff's case to show that the criminal prosecution was instituted against him without probable cause. The verdict and judgment of acquittal were sufficient to raise the presumption that the plaintiff was not guilty of the crime charged against him, but it was incumbent on him to go further, and by putting all the facts and circumstances which led up to the prosecution before the jury, make it appear that it was instituted without probable cause. If, as a matter of fact, a criminal prosecution is instituted for some collateral purpose, and as a means of coercing another to surrender some right or claim which he makes, regardless of whether

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or not the person against whom it is commenced has committed a criminal offence, the prosecution so begun is without probable cause. *Paddock v. Watts*, 116 Ind. 146; *Kimball v. Bates*, 50 Maine, 308.

It was therefore competent to show the institution of the civil suit a few days before the criminal prosecution was commenced, in order to show a motive for the prosecution other than the belief that the plaintiff was guilty of a criminal offence.

The judgment rendered in the civil suit was also admitted in evidence, but as this was afterwards withdrawn or stricken out by the court, there was no error. Indeed, it is not entirely clear that the judgment was not competent evidence.

Before the civil or criminal suit had been instituted, the plaintiff wrote a letter to the defendant in which he complained that the latter had not kept the partnership account correctly; that he had failed to give the writer credits for about \$1,200 to which he was entitled, and asking for an itemized account. He also complained of the refusal of the appellant to correct the books, or to give him a statement of his account, and claimed that there was money due him from the appellant. He also informed the appellant that he had sold the seven head of cattle already mentioned, and explained the reasons for selling them. This letter was admitted in evidence as part of the plaintiff's case. In this there was no error. The letter was admissible as tending to show that the appellant knew, at the time he instituted the criminal prosecution for the larceny of the cattle referred to in the letter and for embezzling the money received for them, that the plaintiff was acting in good faith and under a claim that he had a right to dispose of the cattle.

There was no error in admitting the evidence of Huston, in relation to an attempted settlement or statement of the partnership account. It was not an attempt to compromise a threatened or pending lawsuit. His testimony related simply to what occurred at a time when the account, as kept

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by the appellant, was being stated. Nor was there any error in permitting the jury to examine the appellant's book, in which the partnership account was kept, with a view to determine whether or not the account had not been erased and interlined to the plaintiff's disadvantage. The plaintiff's claim was, that he had a right to sell the cattle and appropriate the proceeds of the sale to his own use, because the appellant was indebted to him on partnership account. He claimed further that the appellant had so erased and changed the account which he kept in his book as to show that there was nothing due him, and these changes and erasures appeared on the book. It was, therefore, competent to introduce the book in evidence and submit it to the inspection of the jury.

We have examined the instructions, the giving of which is made the ground of complaint. Without setting them out or elaborating the reasons, we content ourselves with saying that the law applicable to the facts of the case was correctly stated to the jury.

In the seventh instruction the jury were told that if the appellant was indebted to the plaintiff at the time the cattle were sold the latter had the right to sell them and appropriate the money to his own use. As applicable to the plaintiff's theory of the case, that the cattle were partnership property, the instruction was correct beyond question.

The instructions are not obnoxious to the objection that they were inconsistent and contradictory. It is impossible to read them as a whole without coming to the conclusion that the jury must have understood the theory of each of the parties, and the law applicable thereto. There is, of course, some conflict in the evidence, but it is difficult to find any evidence, even in the appellant's own testimony, which tends to show any probable cause for instituting the criminal prosecution against the plaintiff. It can not be said that the verdict and judgment are not sustained by the evidence.

It only remains that we dispose of the last objection, and

Craig v. Hamilton.

that is, that the damages are excessive. We were impressed with this view of the case in the beginning. When it is remembered, however, that the plaintiff, who is shown to have enjoyed the confidence of the community in which he lived, and to have been in good repute for honesty and uprightness, was, without any probable cause, subjected to arrest and trial on a charge of felony, that the appellant employed counsel to assist in securing his conviction, and that the probable purpose of the prosecution was to coerce the plaintiff to surrender up an honest claim which he was asserting—these, with some other aggravating features of the case, induce us to conclude that the jury arrived at the amount of their verdict deliberately, without the intervention of passion, partiality or prejudice.

The judgment is therefore affirmed, with costs.

Filed March 7, 1889; petition for a rehearing overruled May 7, 1889.

No. 13,697.

CRAIG v. HAMILTON.

FRAUD.—Conveyance of Land.—Representations.—Fraudulent Concealment.—

Where one represents to another that he is entitled to a full third of the estate left by his deceased father, and fraudulently conceals from the other the fact that, by reason of advancements made to him by his father, he has no interest in such estate, and thereby induces the other party, who relies upon the representations, to convey land to him upon receiving a quitclaim deed for such supposed interest, there is such fraud as gives a right of action.

SAME.—Acting on Own Judgment.—Instruction to Jury.—But if, in such case, the plaintiff did not rely upon the representations made to him by the defendant, but sought and obtained information from other sources, and

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then, acting on his own judgment, concluded to enter into the contract and take his chances as to what he would get by reason thereof, he is not entitled to recover, and it is error to refuse to so instruct the jury.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

F. M. Trissal, for appellee.

COFFEY, J.—The second paragraph of the complaint, upon which this cause was tried in the circuit court, avers, substantially, that on the 30th day of July, 1880, the appellee and Nancy M. Coppersmith were the owners and tenants in common of one hundred and twenty acres of land in Hancock county, Indiana, of the value of six thousand dollars; that at said date appellant and one William W. Craig were the sons and heirs at law of Moses Craig, deceased; that Moses Craig died intestate the owner of two hundred and forty acres of land, situate in the counties of Marion and Hamilton, of the value of twelve thousand dollars, but at the date aforesaid there had been no settlement or distribution of his estate; that appellee and the said Coppersmith agreed with the appellant and the said William W. Craig to convey to them their interest in the said land in Hancock county in consideration of four hundred dollars to be paid to each of them, and in consideration that the appellant and the said William W. would convey to and vest the title in the appellee of one-third in value of all the lands of which the said Moses Craig died seized in the counties of Marion and Hamilton; that appellant and the said William W. represented to the appellee that they, as the heirs of the said Moses Craig, were the owners of one full third of all said lands, and that upon a distribution of their said father's estate there would be set apart and assigned to appellee, as their grantee, one-third of said real estate in value, of the value of four thousand dollars; that pursuant to the terms of said agreement, and relying upon said representations and agreement aforesaid, appellee and said Coppersmith conveyed to said appellant and

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the said William W. their said land in Hancock county ; that said appellant and the said William W. executed and delivered to appellee a quitclaim deed, purporting to convey to him their interest in the said lands of which the said Moses Craig died seized ; yet the appellee has not been, and can not be placed in the possession or actual ownership of any interest whatever in said lands, for the reason that there had been advanced by the said Moses Craig, in his lifetime, to the said appellant and the said William W., real and personal property of greater value than their supposed interest in the lands of which the said Moses Craig died seized, with which said advancements the said appellant and the said William W. were chargeable in the division of said estate ; and in a partition, since made, it has been duly adjudged and determined that they had no interest whatever in said lands, and that they had no interest whatever in their said father's estate ; that the appellant and the said William W. not only concealed from the appellee the fact that said advancements had been made to them, but falsely and fraudulently represented to him that they were entitled to one full third of the estate of the said Moses Craig, for the purpose of inducing him to enter into said contract, and that he was induced thereby to make the same ; that since making said contract the said William W. Craig has died insolvent, leaving no estate whatever.

A demurrer to this complaint was overruled by the court, and the appellant excepted.

The appellant filed an answer in three paragraphs, to which a reply was filed.

The cause was tried by a jury, resulting in a verdict and judgment for the appellee.

The appellant assigns as error :

1st. That the circuit court erred in overruling the demurrer of the appellant to the complaint.

2d. That the circuit court erred in overruling the appellant's motion for a new trial.

We do not think that the circuit court erred in overruling

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the demurrer to the complaint. It is true that the conveyance was by quitclaim deed, and that there was no warranty, still the complaint charges that the appellant fraudulently concealed from the appellee the fact that he had been advanced by his father a sum equal to his share in the estate, and that he represented that he and William W. Craig were entitled to one full third of said estate. This, in our opinion, was such a fraud upon the appellee as gave him a right of action.

The appellant, at the proper time, asked the court to instruct the jury :

4th. "If the defendant made false and fraudulent representations or statements, and the plaintiff did not rely on them, but sought and obtained information as to the facts from other sources, and then, on his own judgment, concluded to enter into the contract mentioned in the complaint, and take his chances as to what he should get by reason thereof, then he can not recover in this action on that issue."

If the appellee did not rely upon the representations made to him by the appellant, but relied upon information obtained from other sources, and upon his own judgment, he can not be heard to claim that he was defrauded by the appellant. To constitute fraud, it is necessary that the party alleging it should show that he relied upon the representations alleged to be false. *Pattison v. Jenkins*, 33 Ind. 87; *Hoffa v. Hoffman*, 33 Ind. 172; *Meyer v. Yesser*, 32 Ind. 294; *Bowman v. Carithers*, 40 Ind. 90; *Hagee v. Grossman*, 31 Ind. 223.

The court erred, we think, in refusing to give this instruction.

Several other special instructions were asked by the appellant, but we do not think the court erred in refusing to give them.

For the error committed in refusing to give the instruction above set out, the judgment of the court below must be reversed.

Judgment reversed, at the costs of the appellee, with in-

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structions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed May 7, 1889.

118	569
124	381
118	569
130	38
130	60

No. 14,515.

BROWN v. WUSKOFF ET AL.

JUDGMENT.—*Of Justice of Peace.*—*Filing Transcript.*—*Duration of Lien.*—*Execution.*—*Injunction.*—*Statute Construed.*—A judgment rendered before a justice of the peace is a lien upon the real estate of the defendant within the county from the time a transcript thereof is filed, recorded and docketed in the county clerk's office, to the end of ten years from the rendition of the judgment and not from the time the transcript is filed, and a sale upon execution issued after ten years from the rendition of the judgment will be enjoined at the suit of an intervening purchaser. Sections 608, 612 and 613, R. S. 1881, construed.

From the Montgomery Circuit Court.

B. Crane and *A. B. Anderson*, for appellant.

T. V. Maxedon, *H. D. Vancleave*, *W. T. Brush* and *A. D. Thomas*, for appellees.

OLDS, J.—The complaint is in two paragraphs, each alleging a similar state of facts.

The facts which are important for the determination of the questions presented, as they appear from the complaint, are as follows: On January 23d, 1877, defendants Moses Wuskoff and Daniel Husburg obtained a judgment for \$163.40 against William R. Fry and Willian J. Ott, before Scott Noel, a justice of the peace of Parke county. On February 15th, 1877, execution issued thereon, and August 22d, 1877, the execution was returned by the constable *nulla bona*.

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December 6th, 1880, the appellant, Joseph S. Brown, defendant William R. Fry, and one Aaron H. Blair, purchased a tract of land at an agreed price of \$5,000, containing twelve acres, situated in Montgomery county, from one Alexander Thompson, who held it as trustee. The purchasers paid one-third cash, each furnishing his proportionate share of the amount, and executed their notes for the balance of the purchase-money. Aaron Hughes and wife held a life-estate in the land, and Brown, Blair and Fry purchased their life-estate for \$1,000, and paid cash therefor, each contributing his proportionate share thereof, and Thompson, Hughes and Hughes conveyed said land by warranty deeds to Brown in trust for himself, Blair and Fry, the purchasers executing a mortgage to Thompson for the balance of the purchase-money due him, and the deeds and mortgage were duly recorded. Brown, Blair and Fry surveyed and platted the land into lots, numbering from 1 to 42, inclusive, as Brown, Blair and Fry's addition to Crawfordsville. April 8th, 1883, Fry borrowed \$3,000 of the First National Bank of Crawfordsville, Indiana, and executed his note to the bank for the same, with Brown and one Insley as sureties; he also executed his mortgage to Brown on his undivided one-third of all the unsold lots to indemnify Brown as such surety. January 8th, 1883, Blair sold and conveyed by warranty deed all his interest in the lots to Brown. May 9th, 1883, appellees Wuskoff and Husburg filed a duly certified transcript of their judgment against Fry and Ott in the office of the clerk of the Montgomery Circuit Court, and the same was by said clerk on said day duly recorded in the order-book of the court, and the judgment was entered in the judgment docket. May 23d, 1883, Brown, as trustee for himself and Fry, sold and conveyed by warranty deed lot 25 to William Halehan in consideration of \$325, and put Halehan in possession of the same. September 25th, 1883, Fry sold and by warranty deed conveyed to Alexander Thompson all his interest in the lots yet remaining unsold, Thompson, in consideration for the

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conveyance, to pay \$1,800 remaining unpaid on the note to the First National Bank of Crawfordsville. October 10th, 1883, Thompson paid off the note to the bank, on which Brown and Insley were sureties, and Brown entered satisfaction of the indemnity mortgage. August 31st, 1887, Thompson sold and conveyed by warranty deed all his interest in the lots to Brown. March 23d, 1888, Wuskoff and Husburg procured from the justice, Scott Noel, a certificate that an execution had been duly issued by him on the judgment in their favor against Fry and Ott, to the proper constable, and the constable had returned the same *nulla bona*, and on the same day filed the certificate in the office of the clerk of the Montgomery Circuit Court, and the clerk duly recorded it in the order-book of the court. March 30th, 1888, Wuskoff and Husburg caused an execution to be issued by the clerk of the Montgomery Circuit Court on the judgment, and delivered the same to appellee McCloskey, as sheriff of Montgomery county, and directed him to levy the execution on the real estate which had been so conveyed to, and was then owned by, Brown; also, on lot 25, which had been sold and conveyed to Halehan. The sheriff levied the execution on the said real estate, including lot 25, and advertised all of the said lots for sale. Thereupon, on the 23d day of April, 1888, the appellant brought this suit, alleging the facts as herein stated, asking that the sheriff be enjoined from executing said writ and selling the lots, that his title to the same be quieted, and that the indemnity mortgage be declared a first lien on the lots and foreclosed to pay the balance of the \$1,800.

Appellees Wuskoff and Husburg filed a joint demurrer to each paragraph of the complaint, and defendant McCloskey filed separate demurrers to each paragraph of complaint. The cause came up for hearing and the court sustained each of the demurrers to each paragraph of the complaint, to which decision of the court the appellant duly excepted, refused to amend, and the court rendered judgment, in favor of appel-

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lees, against appellant for costs. The errors assigned are the sustaining the demurrers to the complaint.

The questions presented are: *First.* The justice before whom the judgment was rendered, and who certified the same, resided in Parke county, the real estate is situated in Montgomery county, and the transcript was filed and recorded in the clerk's office of the Montgomery Circuit Court; the official character of the justice not being certified to by the clerk of the Parke Circuit Court, was the transcript entitled to record, or had it any validity as a lien without the certificate of the clerk of the Parke Circuit Court as to the official character of the justice? *Second.* More than ten years having elapsed between the rendition of the judgment before the justice of the peace and the issuing of the execution by the clerk of the Montgomery Circuit Court, Fry having disposed of all his interest in the lots before execution issued, and Brown having become the owner of the same, except lot 25, which he had conveyed by warranty deed to Halehan, but the execution issuing less than ten years from the time of filing the transcript, was the transcript still a lien on the interest Fry owned in the lots at the time the transcript was filed which could be enforced by execution?

A further question is presented as to the right of the appellant to have a foreclosure of his mortgage.

Section 608, R. S. 1881, provides: "All final judgments in the Supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained," etc.

Section 612 provides: "It shall be the duty of every justice of the peace in this State, when requested by the plaintiff or his agent, to make out and certify a true and complete transcript of the proceedings and judgment in any cause upon any docket legally in his possession. The plain-

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tiff may file such transcript in the office of the clerk of any court in this State."

Section 613 provides: "It shall be the duty of the clerk, forthwith, to record the transcript in the order-book, and docket the judgment in the judgment docket. The judgment set forth in the transcript shall be a lien upon the real property of the defendant within the county, to the same extent as judgments of the court, from the time of filing the transcript."

The provision in section 613 is, that the judgment rendered before a justice of the peace, when certified and recorded in the order-book in the clerk's office, shall be a lien on the real property of the defendant to the same extent as judgments of the court, from the time of filing. Section 608 declares the extent of the lien to be for the space of ten years after the rendition thereof, and no longer. Therefore, manifestly the proper construction to be given to section 613 is that the lien shall take effect from the time of filing the transcript, and that it shall extend and be in force for the period of ten years from the rendition of the judgment.

In the case of *Martin v. Prather*, 82 Ind. 535, this court says: "True, the filing of a transcript after the ten years had expired would not make the judgment a lien upon real estate." It is contended by counsel for appellees that the lien extends ten years from the time of filing the transcript. We can not agree with that theory. There is no time fixed by the statute when the transcript shall or may be filed in the office of the clerk. It may be filed at any time during the lifetime of the judgment, although it would not be a lien after the ten years from the rendition thereof. Proper steps being taken, execution might be issued any time during the lifetime of the judgment, and levied by the sheriff on real estate owned by the execution defendant at the time of the levy; but to hold that the lien extends ten years from the date of filing and recording the transcript, would be to hold that ten years additional life might be given to a judgment

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rendered before a justice of the peace by waiting until the day before the judgment is barred by the statute of limitations and then filing a certified transcript in the office of the clerk of the circuit court. More than ten years having elapsed between the rendition of the judgment by the justice of the peace and the issuing of the execution by the clerk of the circuit court, the lien created by the transcript had expired. Fry having before that time parted with the title to the real estate, the appellant having become the owner of it, except lot 25, which he had before that time conveyed to Halehan by warranty deed, and the appellees, claiming a valid lien on the lots by virtue of the judgment, having had an execution issued and levied upon the lots and advertised them for sale, the appellant, on the facts stated in the complaint, was manifestly entitled to have his title to the lots quieted as against appellees, and to a restraining order to prevent the sale. The court, therefore, erred in sustaining the demurrers to the complaint. As this one question settles the whole case, it is unnecessary to pass upon the others. *Lake Shore, etc., R. W. Co. v. Cincinnati, etc., R. W. Co.*, 116 Ind. 578.

The judgment is reversed and cause remanded, with instructions to the court below to overrule the demurrers to each paragraph of the complaint.

Filed Jan. 10, 1889.

ON PETITION FOR A REHEARING.

OLDS, J.—It is very earnestly contended by counsel that this case was wrongly decided, and that an unwarranted construction was placed upon the statute declaring in what manner and to what extent judgments rendered before justices of the peace shall be liens upon real estate. Some authorities are cited which it is contended are in conflict with the original opinion. It is asserted that the case of *Rand v. Garner*, 75 Iowa, 311, is in direct conflict with the decision in this case.

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An examination of that case will disclose the fact that it is not in conflict with what we decided in this, and that the questions presented are not at all similar, the statutes under consideration being entirely different.

The Iowa statute declaring the manner and extent of the liens of judgments rendered before justices of the peace upon real estate, is as follows :

Section 3568. "The clerk shall forthwith file such transcript and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects, as to its effect and mode of enforcement, as a judgment rendered in the circuit court as of that date ; and no execution can thereafter be issued by the justice on the judgment." The court in that case very properly says of that statute : "Under that provision we think the judgment has all the force and effect of a judgment rendered by the circuit court as of the date of the filing of the transcript." The Iowa statute merges the judgment before the justice into a judgment in the circuit court ; it cancels the justice's judgment and creates a new judgment in the circuit court. But the statute in this State differs very materially from the Iowa statute. It declares that judgments of the circuit court shall be a lien for the period of ten years from the rendition thereof, and no longer. After providing for the procuring, filing, recording and docketing of a judgment rendered before a justice, the statute declares that "The judgment set forth in the transcript shall be a lien upon the real property of the defendant within the county, to the same extent as judgments of the court, from the time of filing the transcript."

Section 614 provides how executions shall be obtained on such judgment. It requires that an execution shall be issued by the justice, and if it be returned endorsed that no goods or chattels could be found sufficient to satisfy the judgment, or a part thereof, upon a certificate of such fact being filed with the clerk and recorded by him, and upon affidavit being

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filed that the judgment is unpaid in whole or in part, stating the amount due, an execution shall issue on the judgment. The filing of the transcript in the clerk's office does not affect the validity of the judgment rendered before the justice; execution may still be issued upon it, and it may be collected the same as if no transcript had been filed.

The statute declaring that a judgment rendered before a justice shall be a lien on real property does not stipulate that it shall be a lien for ten years from the time of the filing or recording of the transcript, but that it shall be a lien to the same extent as judgments of the court. And the word "extent" must apply as well to the time of its duration as to the character of the lien, and we give full force to the words of the statute when we say the duration of the lien shall be for ten years from the date of the rendition of the judgment, for that is the duration of the lien of a judgment rendered in the circuit court, as it is declared by statute it shall be a lien for ten years and no longer. The construction we place upon the statute is, that a judgment rendered before a justice shall be a lien from the time the transcript is filed, recorded and docketed, to the end of ten years from the rendition of the judgment. If we transpose the words of the statute to read: "From the time of filing the transcript, the judgment set forth in the transcript shall be a lien upon the real property of the defendant within the county, to the same extent as judgments of the court," it would hardly be contended, we think, that it could be construed to create a lien for ten years from the filing of the transcript; but when thus transposed it seems plain that the word "extent," as applied to the duration of the lien, should relate to the time of the rendition of the judgment, corresponding to the time when the limitation commences to run against judgments of the circuit court, and the words mean the same, whether they are transposed or read as written in the statute. Indeed, this is the only construction that can be placed upon this section of the statute and give force to the words. If, as contended

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by counsel, the lien extends ten years from the filing of the transcript, a transcript might be filed at the end of nineteen years from the date of the rendition of the judgment before the justice, and after the expiration of twenty years the judgment would be barred. And if, during the twenty years, no execution had been issued and returned, and a certificate filed in the clerk's office, as required, no execution could issue after that date, as a judgment can not be revived after twenty years (*Strong v. State, ex rel.*, 57 Ind. 428), and the judgment lien could not be enforced by execution. It is evident to us that it was not contemplated to create a lien that could not be enforced by execution in the ordinary way, or to give validity to judgments rendered before justices for a greater length of time than to judgments of the circuit court. After the expiration of twenty years the judgment could not be enforced, and a judgment which can not be enforced against property is not a lien upon property. *Lamb v. Shays*, 14 Iowa, 567; *Stadler v. Allen*, 44 Iowa, 198. To extend the lien ten years from the date of filing the transcript, would be creating or attempting to create a lien without any means of enforcing it. Judgment liens are created by statute and have only such validity as is given them by statute, and do not extend beyond the time fixed. The provision for the filing of a transcript and for an execution to be issued thereon by the clerk of the circuit court, is but adding additional force to judgments rendered before justices, and providing an additional method for their collection.

We are also referred by counsel to the case of *Waltermire v. Westover*, 14 N. Y. 16, which it is most seriously urged is in direct opposition to our decision in this case. The question decided in that case is not at all like the one in this. As appears from the case, the statute of New York provides that the lien of a judgment of the common pleas court ceases, as against purchasers in good faith and subsequent incumbrancers, at the end of ten years from the time of docketing, but continues

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as against the defendant himself until the statutory presumption of payment arises, at the end of twenty years; and in that case a judgment was rendered before a justice July 25th, 1837, and on July 27th, 1837, a transcript was filed and docketed in the office of the clerk. On the 22d of June, 1843, the clerk issued an execution on the judgment, and delivered it to the sheriff on the 10th day of July, 1843, and on the 12th day of July, 1844, the sheriff, by virtue of the execution, sold the real estate in question. It was provided by statute that a justice's judgment, docketed by a county clerk, "shall be a lien on the real estate of the defendant within the county, in the same manner and with the like effect as if such judgment had been in the court of common pleas."

If you give like force and effect to the words "same effect," in the New York statute, that we have given to the words "same extent," it would extend the lien ten years from the date of the docketing of the justice's judgment, as the New York statute extends the lien of a judgment of the court of common pleas ten years from the date of docketing. But our statute is entirely different, as it extends the lien ten years from the date of the rendition of the judgment. But that question is not decided in the case cited, as only about seven years had expired from the rendition of the justice's judgment to the time of the sale. The statute in that State declared that all actions upon justice's judgments "shall be commenced within six years next after the cause of such action accrued," and the question for decision was as to whether that provision annihilated the lien at the end of six years, and the court held that, as the six years' statute was in terms confined to the remedy by action, it did not operate to annihilate the remedy by execution. It does not appear what the mode of issuing execution was under the New York statute, but it in no way appears that any execution was required to be issued by the justice and a certificate and affidavit filed with the clerk to obtain an execution, as are required in this State. The clerk issued an execution as authorized, and the

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law was no doubt similar to that of the State of Iowa, hereinbefore set out.

This same construction has been placed upon this statute by this court in two other cases: *Martin v. Prather*, 82 Ind. 535, and *Yeager v. Wright*, 112 Ind. 230. Though it was not discussed and the reasons given for the decision, yet the same construction was given to the statute.

The petition for a rehearing is overruled.

Filed April 26, 1889.

No. 12,543.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILWAY COMPANY v. LANG, ADMINISTRATRIX.

MASTER AND SERVANT.—*Railroad.—Section Hand.—Special Service.—Injury by Wild Train.—Liability of Master.*—Where a railroad company orders a section hand to go to a designated place upon the road and there perform a special service, it is liable for an injury caused to him, without his fault, while proceeding to the designated place, by the hand-car upon which he is riding coming in collision, at a short curve, with a wild train of the running of which he is not notified, and of the approach of which no warning is given, the danger to which he is thus exposed not being one of the ordinary risks of the service which he assumes.

SAME.—*Rule Governing Employees.—Disobedience of Order.—When Master not Liable.*—But where the railroad company has adopted and promulgated a rule requiring section hands to be prepared at all times for special or irregular trains, and where the injury occurs at a place beyond that to which the special order directed the employee to go, the company is not liable.

From the Dearborn Circuit Court.

118	579
122	591
118	579
124	428
127	51
118	579
129	337
118	579
130	325
118	579
131	535
132	201
132	343
133	238
118	579
134	158
118	579
143	58
118	579
146	218
118	579
151	302
151	315
152	596
118	579
170	15

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J. D. Haynes, J. K. Thompson, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellant.

J. S. Scobey, for appellee.

ELLIOTT, C. J.—The material allegations of the appellee's complaint are these: That her intestate, Jacob Lang, was in the service of the appellant as a section hand on the 14th day of December, 1884, and had then been in its service for twelve months; that the foreman under whom he worked was Nicholas Lang; that on Sunday, the 14th day of December, 1884, the appellant directed its section foreman, Nicholas Lang, to take his crew of hands and repair a part of its track not far from the town of Weisburg, and that, pursuant to the order, the foreman caused his crew, of which the deceased was one, to get upon a hand-car and proceed to the place indicated; that the hand-car was operated with due care and caution, and was run in a safe and prudent manner; that on Sunday, the 14th day of December, the day on which the foreman, Nicholas Lang, was directed to make repairs, the appellant sent on the railroad from Indianapolis a locomotive and car destined to the city of Cincinnati, and that it neglected to give any notice that the engine and car had been sent out upon the road; that the crew of the hand-car in charge of foreman Lang, when near a short curve, were suddenly met by the engine and car approaching from the opposite direction; that the engine and car were running at the rate of fifty miles an hour; that, upon seeing the engine and car approaching, foreman Lang and his crew stopped the hand-car as soon as it was possible to do so, and the intestate at once alighted from it; that the engine struck the hand-car and threw it against him, and so injured him as to cause his death within two hours; that no whistle was sounded or other signal given by the engineer; that, by reason of the curve in the track, the approach of the engine and car could not be seen in time to escape collision; that the intestate, by

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the use of the utmost diligence and care, could do no more than alight from the hand-car near the side of the track where he was when the hand-car was thrown upon him; that the locomotive and car composed a wild or irregular train, running without a time-table and at the pleasure of those controlling it; that it was the duty of the defendant to have given information of the wild train to the foreman and men composing the hand-car crew; that the persons operating that train and the train dispatcher were incompetent, and that the defendant was guilty of negligence in employing and in retaining them; that the injury to the intestate was caused by the negligence of the defendant, and without fault on his part.

The complaint states a cause of action. The appellant, by special order, directed the intestate to go to a designated place and there perform service in the line of his duty, and the appellant did not, by notice, rules or instructions, make any provision for his safety while obeying its order. It was bound to know the nature of the service it had ordered him to perform, the place where it was required to be performed, and, with this knowledge, it had no right to put him in peril by sending out an irregular train without in some way giving notice that its train had been sent out, or by so regulating its speed and management as to prevent injury to those engaged in the service required of them by the special order. By the order of the appellant the special duty in which the intestate was engaged was enjoined upon him, and having thus required him to perform the duty, it had no right to send over its road a train which the employees, engaged as was the intestate, had no reason to expect would make obedience to the special order unusually perilous. It may be true that the intestate was bound to know of the danger from regular trains, running according to time-tables or rules, and yet not be true that he was bound to know that a wild or irregular train would be run over the road, and so run as to bring about a collision. The peril from the wild

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train he was not bound to anticipate, for the reason that, from the assurance impliedly contained in the special order assigning a designated duty to him, he had a right to assume, in the absence of countervailing facts, that, if he himself exercised care and diligence, the company would not send out a wild train without exercising ordinary care and diligence to prevent injury to him while travelling in the usual way to the place where he was called by the duty assigned him, and while performing that duty at the place designated. It can not be justly asserted, under the averments of the complaint, that the danger to which the company exposed him was one of the ordinary risks of the service which he assumed. In affirming that the facts stated in the complaint constitute a cause of action, we do not depart from the general rule that the employee assumes the ordinary risks incident to his service, declared in *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20 (5 Am. St. 578), *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265, and many other cases. What we decide is, that the facts stated in the complaint make a case belonging to a different class, for, as the intestate was assigned to a special duty by a special order, and it does not appear that there were any rules requiring section men to guard against irregular trains, nor any care taken, either by regulating the speed of the wild train or by notice, to provide for his safety, and it does appear that he was himself entirely without fault, the peril he was subjected to from the irregular train can not be regarded as one of the ordinary risks incident to the service he had entered. On the admitted facts there is a *prima facie* case against the appellant. *Cincinnati, etc., R. W. Co. v. Long*, 112 Ind. 166; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Halcy v. Case*, 142 Mass. 316; *Goodfellow v. Boston, etc., R. R. Co.*, 106 Mass. 461; *Crowley v. Burlington, etc., R. W. Co.*, 65 Iowa, 658; *Abel v. President, etc.*, 103 N. Y. 581; *Reagan v. St. Louis, etc., R. W. Co.*, 93 Mo. 348; *Lewis v. Seifert*, 116 Pa. St. 628.

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The duty of providing for the safety of employees rests on the employer, and can not be delegated. In this instance the duty of exercising reasonable care to prevent injury to the intestate while going to the place where he was ordered, and providing for his security, rested upon the appellant. It was, therefore, the duty of the master that was neglected, and it was this neglect of duty, and not that of a fellow-servant, which caused Jacob Lang to lose his life. *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566; *Louisville, etc., R. W. Co. v. Sandford, supra*; *Indianapolis, etc., R. W. Co. v. Watson, supra*; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Franklin v. Winona, etc., R. R. Co.*, 37 Minn. 409 (5 Am. St. 856).

If the master's negligence is the principal cause of the injury, then he will not be absolved from liability, although the negligence of a fellow-servant may have concurred in causing the injury; so that, if it were true that the negligence that caused the collision was in part that of the persons in charge of the wild train, even then the appellant, under the case made by the complaint, would be liable. This conclusion is well fortified by authority. *Franklin v. Winona, etc., R. R. Co., supra*; *Faren v. Sellers*, 39 La. Ann. 1011 (4 Am. St. 256); *Cayzer v. Taylor*, 10 Gray, 274 (69 Am. Dec. 317); *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Booth v. Boston, etc., R. R. Co.*, 73 N. Y. 38 (29 Am. Rep. 97).

The material questions presented by the motion for a new trial are radically different from those presented by the demurrer to the complaint. The application of settled principles of law to the evidence makes it necessary for us to declare that the verdict and judgment can not be sustained. This conclusion is forced upon us by the evidence, which shows, and this without contradiction or conflict, that the appellant had promulgated rules for the government of its employees, and that Jacob Lang was injured at a place beyond the point which the special order directed him to go.

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We have not examined the evidence to ascertain whether the appellant's contention upon other points than those mentioned is just, for this we deem it not proper to do, as the conclusion we have reached upon the points named is fatal to the judgment.

One of the rules of the company contained a provision requiring section men "to be prepared at all times for special or irregular trains." This provision not only imparted to the employees notice that irregular trains might at any time be sent over the road, but it also required employees to be at all times prepared for such trains. Jacob Lang, in taking service with the appellant, became bound by the rule, for it is the duty of the railroad company to make rules, and of those in its service to obey them. *Pennsylvania Co. v. Whitcomb, supra*. He was, therefore, bound not to enter a curve, where an irregular train might come upon him, without taking precautions to discover its approach and avoid a collision.

Obedience to the rules of a railroad company is, as a matter of law and of high public policy, required from the employees, since without obedience those who travel by railroad would be subjected to greatly increased danger. Disobedience or disregard of rules is always a defence to an action by the servant against the master, unless there are facts which, in the particular instance, excuse the employee or relieve him from the duty of strict obedience. We do not undertake to decide what facts will take a case out of the operation of the general principle which requires adherence to the rules promulgated by the employer, for our work is done when we affirm that in this instance there are no facts which relieved the employee from the operation of the general principle. Conceding, but not deciding, that the special order did relieve him from the operation of this general principle, and did warrant him in assuming that the rule of the company requiring employees to be at all times prepared for irregular trains was suspended for the time, still, the utmost that can be concluded from this concession is, that the protecting effect

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of the special order did not extend beyond the place it designated. The effect of the special order, conceding all that can with any plausibility be claimed for it, is completely nullified by the fact that the collision occurred at a place beyond that specified in the order. It can not be asserted, with any trace of reason, that the order led the intestate to presume that the track was safe beyond the place designated in the order itself, even if so much force can be conceded to it. When the hand-car was taken beyond that place the employees ceased to act under orders, and, in truth, were disobeying orders, so that it can not be possible that the order cast any protection about them, or longer gave them any assurance which imposed liability upon their employer.

We are unwilling to hold that a railroad company, which has made and promulgated rules requiring its employees to be at all times prepared for irregular trains, is bound to give special notice to the section men along the line as each irregular train is sent over the road. There may be cases where special notice is required, but such cases constitute exceptions to the general rule. It is undoubtedly true that the employer must always exercise ordinary care and diligence to secure the safety of employees, and it is probably true that cases may arise in which ordinary care would require notice to section men along the line of the road. But, whatever may be the rule where special orders are adhered to, and the injury is received in executing them, it is quite clear that a section man injured while going over a part of the road not covered by the special order, can not successfully claim that the employer must respond in damages because he was not notified that a wild train was on the road, destined to a point which would make it traverse the place designated in the special order. If the employee had been at the place so designated we should have a very different case, and one that would require us to decide whether the circumstances were such as to make it the duty of the employer to give special notice.

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If there was negligence on the part of the section foreman and of those in charge of the special train, it was that of fellow-servants, and for such negligence the master is not liable. We have many decisions upon this question, and it can not be regarded as open to discussion.

Judgment reversed, with instructions to award a new trial.

Filed May 7, 1889.

118	586
123	517
118	585
125	268
118	586
156	73

 No. 13,680.

TESCHER v. MERECA.

PROMISSORY NOTE.—*Given for Patent-Right.*—*Violation of Statute.*—*Innocent Holder.*—A negotiable promissory note, fair upon its face, is valid in the hands of an innocent holder for value, although taken by the payee in violation of the statute regulating the sale of patent-rights.

SAME.—*Presumption of Holder's Good Faith.*—*What Circumstances will Overthrow.*—The circumstances which will overthrow the presumption that the purchaser of commercial paper acquired it in good faith, must be pointed and emphatic and lead directly and irresistibly to the conclusion that the purchaser had notice.

SAME.—*Notice of Fraud.*—*Abstaining from Inquiry.*—The ultimate fact to be found is not whether the purchaser might have ascertained or could have known that the note was fraudulently obtained, but whether he in fact knew it, or acted in bad faith in abstaining from inquiry.

SAME.—*"Usual Course of Business."*—*Meaning of Phrase.*—The phrase "in the usual course of business," is not confined to persons engaged habitually in banking or purchasing notes; but one who in good faith purchases a negotiable note before maturity, for value, or who takes it in payment of an antecedent debt, is not out of the usual course of business.

SAME.—*Payable to Bearer.*—A note payable to the order of A. B. or bearer, is in legal effect the same as if payable simply to bearer, and the title passes to whomsoever becomes the lawful holder.

From the Hamilton Circuit Court.

Teschler v. Merea.

W. S. Christian, I. W. Christian and G. S. Christian, for appellant.

R. R. Stephenson and W. R. Fertig, for appellee.

MITCHELL, J.—Teschler commenced suit against Merea and Haverstick to recover the amount due on a promissory note, payable in a bank in this State “to the order of H. Richwine or bearer.” The note had been transferred to the plaintiff by delivery, for a valuable consideration, before due. The material facts were uncontroverted. Richwine had sold and assigned to the makers of the note an interest in a certain patent-right, and had taken the note in suit in payment therefor. The sale was made in violation of the statute which makes it a misdemeanor for any person to sell or barter any patent-right without first filing with the clerk of the court duly authenticated copies of the letters-patent. The statute which requires the words “given for a patent-right” to be inserted in the body of any obligation taken in such a transaction, was also disregarded. The evidence showed that the plaintiff was a clerk in a clothing store at the time he purchased the note, and that he had no notice or knowledge as to the consideration for which it was given; that he knew the makers of the note and was acquainted with their signatures, and that he purchased and paid for it, relying upon the genuineness of their signatures and upon the fact that it was mercantile paper, without making inquiry as to the consideration upon which it was given. The note calls for the payment of seventy-five dollars in six months, with eight per cent. interest and attorney’s fees, and the plaintiff paid about sixty-five dollars in cash for it.

It was held, in a case quite analogous to the one now presented, that a promissory note, fair upon its face, which contained the required words of negotiability, although taken by the payee in violation of the above mentioned statute, was nevertheless a valid obligation in the hands of an innocent

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holder for value. *New v. Walker*, 108 Ind. 365; *Sondheim v. Gilbert*, 117 Ind. 71.

Commercial paper is regarded with favor on account of its convenience in mercantile affairs, and so the rule is that nothing short of fraud or bad faith, not even negligence, is sufficient to defeat the right of a holder for value and without notice to recover. *Collins v. Gilbert*, 94 U. S. 753. One who takes such a note before maturity, for value, is not affected by any infirmity not apparent on the face of the paper, nor by any equities between the original parties, unless they are brought to his notice. Possession and production of the note raise a presumption that it was purchased in good faith, and import, *prima facie*, that the holder acquired it for value, without notice and in the usual course of business. *Hall v. Allen*, 37 Ind. 541; *Commissioners, etc., v. Clark*, 94 U. S. 278, 285; 1 Daniel Neg. Insts., section 812.

It is said, however, that the learned court below gave judgment against the plaintiff because he purchased the note without inquiry, and under such circumstances as to show that he abstained from making inquiry from a belief that to inquire would disclose the vice inherent in the note.

It is undoubtedly true that the conclusion may be deduced that a purchaser had notice when there is such a combination of circumstances shown as to create a distinct legal presumption that he was acting collusively and in bad faith, and that he must have known the facts without inquiring. The circumstances which will justify such an inference must, however, be pointed and emphatic, and must lead directly and irresistibly to the conclusion that the purchaser had notice, before the presumption that he purchased the note in good faith can be overthrown. Circumstances calculated to awaken suspicion merely are not sufficient. *Farrell v. Lovett*, 68 Maine, 326; 1 Daniel Neg. Insts., sections 795, 796.

The ultimate fact to be found is not whether the endorsee might have ascertained or could have known that the note was fraudulently obtained, but whether he in fact knew it,

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or acted in bad faith in abstaining from inquiry. As has been said, it is a question not of negligence or diligence, but one of honesty and good faith. *Carroll v. Hayward*, 124 Mass. 120; *Kellogg v. Curtis*, 69 Maine, 212.

There is an entire absence of evidence in the present case tending to show collusion or bad faith on the part of the plaintiff, nor were there any facts or circumstances tending to raise a presumption that he had any knowledge of the transaction out of which the note originated, or that the payee was engaged in the sale of patent-rights. The rate of discount was not of itself, without anything else, calculated to raise any suspicion that the note was issued in violation of law, and we are unable to discover in the evidence any other circumstance that even might tend to suggest any irregularity inherent in the note. It does not appear, nor is it charged, that there was any fraud in the inception of the paper, or that the consideration was not complete and perfect, or that there is any reason why the makers ought not to pay it, except that the paper was taken in violation of the statute regulating the sale of patent-rights.

Where fraud or illegality in the inception of a note is shown by the maker, the burden is on the endorsee to show himself to be an innocent holder. *New v. Walker, supra*, and cases cited. Applying the rule above stated to the note in suit, and yet the evidence shows, without any contradiction whatever, that the plaintiff had no notice.

It is said, however, that the note was not purchased in the usual course of business; that the plaintiff was not engaged in the business of purchasing notes. The phrase "in the usual course of business," signifies according to the usages and customs of commercial transactions, and its application to the purchase of a mercantile note is not confined to persons engaged habitually in banking or purchasing notes. One who in good faith purchases a negotiable note before maturity, for value, or who takes it in payment of an antecedent debt, is not out of the usual course of business. *Baily*

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v. *Smith*, 14 Ohio St. 396; *Kellogg v. Curtis*, *supra*; *Roberts v. Hall*, 10 Am. Law Reg. 760.

There is no force in the suggestion that the note was not payable to bearer, and that the title did not pass by delivery. *Melton v. Gibson*, 97 Ind. 158. A note payable to the order of A. B. or bearer is in legal effect the same as if payable simply to bearer, and the title passes to whomsoever may become the lawful holder.

In the absence of any evidence to support the finding and judgment of the court, the judgment is reversed, with costs.

Filed May 7, 1889.

118	590
123	267
118	590
150	11

No. 13,294.

CASEY v. HULKAN.

SLANDER.—Pleading.—Harmless Error.—Where no evidence is adduced tending to prove alleged slanderous words set out in a paragraph of complaint, an error in overruling a demurrer to such paragraph becomes harmless.

SAME.—Express Malice.—Exemplary Damages.—Where, in an action for slander, express malice is proved, the jury may assess exemplary as well as compensatory damages.

SAME.—Evidence of Other Slanderous Words.—Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice.

SAME.—When Express Malice Exists.—Where the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations, there is express malice.

From the Henry Circuit Court.

J. H. Mellett and *E. H. Bundy*, for appellant.

D. W. Chambers and *J. S. Hedges*, for appellee.

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BERKSHIRE, J.—This is an action by the appellee against the appellant to recover damages because of alleged slanderous words spoken by the appellant of and concerning the appellee.

The complaint contains six paragraphs, and each paragraph contains several sets of words.

To each paragraph and to each set of words in the several paragraphs the appellant demurred; the court overruled the demurrers, and the proper exceptions were reserved.

The appellant filed an answer in general denial only, and the issues joined were submitted to a jury, who thereafter returned a verdict for the appellee. After the return of the verdict the appellant filed a motion for a new trial, which was overruled by the court, and the proper exception reserved, and judgment given for the appellee.

Several errors are assigned, but in the briefs of counsel the discussion is limited to the ruling of the court in overruling the demurrers to the first and second sets of words alleged in the first paragraph of the complaint, and to the action of the court in giving instruction number four to the jury. Our consideration of the case will be confined to the questions argued by counsel.

There was no evidence tending to prove either the first or the second set of words in the first paragraph of the complaint alleged, hence the appellant was not injured by the ruling of the court in overruling the demurrers thereto, and therefore no available error is presented for the consideration of this court. We therefore decide nothing as to the sufficiency of either of the said sets of words as causes of action, but in view of the facts and circumstances stated in the colloquium, which are to be taken in connection with the words charged, we refer to the following authorities: *Harrison v. Findley*, 23 Ind. 265 (85 Am. Dec. 456); *Works v. Stevens*, 76 Ind. 181; *Blickenstaff v. Perrin*, 27 Ind. 527; *Roe v. Chitwood*, 36 Ark. 210; *O'Conner v. O'Conner*, 24 Ind. 218.

We do not think the court erred in giving the instruction

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complained of. If express malice was proven, the jury was authorized to assess exemplary as well as compensatory damages.

The words charged and proven were actionable *per se*; some of them independent of the extrinsic facts averred, and others when taken in connection therewith.

Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice and ill-will. *Markham v. Russell*, 12 Allen, 573 (90 Am. Dec. 169); *Logan v. Logan*, 77 Ind. 558; *De Pew v. Robinson*, 95 Ind. 109.

If the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations, then there is express malice. *Philadelphia, etc., R. R. Co. v. Quigley*, 21 Howard (U. S.), 202; *Day v. Woodworth*, 13 Howard (U. S.), 363.

From the evidence as we find it in the record, we must come to the conclusion that the appellant was not troubled with a stammering tongue; he seems not to have been slow in speech; he did a great deal of talking from the time the larceny is supposed to have been committed until the recovery of the property. It seemed to be his desire for some reason to impress upon his hearers that the appellee was the larcener of the property, and many forms of expression were employed, some of which are charged in the complaint and others not.

The instruction was proper, and it is very evident that the jury were not misled thereby, for the amount of damages assessed is very reasonable in view of the circumstances as established by the evidence.

Judgment affirmed, with costs.

Filed May 8, 1889.

Glass *et al.* v. Davis *et al.*

No. 14,204.

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118	593
126	825
118	593
149	157
149	158

HUSBAND AND WIFE.—Deed.—Jointure.—Rights of Widow as Heir.—A husband and wife united in conveying certain real estate to M., in trust, to be immediately conveyed by the latter to the wife, in lieu of all her interest in the other lands then owned or afterwards acquired by her husband, “as her jointure in her said husband’s lands forever.” On the same day, M. executed and delivered to the wife a deed for the real estate described. The husband died some years later, the owner of other real estate, and leaving neither children nor father or mother, but leaving brothers and sisters of the half-blood only.

Held, that the deeds were intended by the parties to operate as a jointure; that they affect the wife’s rights as widow only; and that, under section 2490, R. S. 1881, as against the brothers and sisters of the half-blood, she takes, as heir, the whole of the estate of which her husband died seized.

From the Howard Circuit Court.

C. E. Hendry and *C. N. Pollard*, for appellants.

J. C. Blacklidge, *W. E. Blacklidge*, *B. C. Moon*, *M. Bell* and *W. C. Purdum*, for appellees.

COFFEY, J.—On the 4th day of January, 1870, George Spring and Elizabeth Spring, at that time being husband and wife, executed to William Miller the following deed of conveyance: “This indenture witnesseth, that George Spring and Elizabeth Spring, his wife, of Fayette county, in the State of Indiana, release and quitclaim to William Miller, of Fayette county, State of Indiana, for the purpose of partition, and the sum of one dollar, the following real estate in Fayette county and State of Indiana, in trust, and to be immediately reconveyed by the said Miller to the said Elizabeth Spring in lieu of all her interest in the other lands now owned by the said George Spring, or of all lands he may own in the future, as her jointure in her said husband’s lands forever.

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Said real estate is described as follows: (here follows a description of the land), and the said Elizabeth also agrees to accept the reconveyance of the lands as above described, in lieu of her interest in the lands now owned by her husband as well as her full portion in his real estate as his wife forever." Which deed was duly signed and acknowledged.

On the same day the said William Miller executed and delivered to the said Elizabeth Spring the following deed of conveyance: "This indenture witnesseth, that William Miller, of Fayette county, and State of Indiana, trustee, as set forth in a deed this day made to him by George Spring and Elizabeth Spring, his wife, of Fayette county, and State of Indiana, in consideration of the sum of one dollar, in pursuance of the power vested in him as such trustee by the deed aforesaid, doth hereby release, remise, convey and quitclaim to said Elizabeth Spring the following tracts of land in Fayette county, Indiana, in lieu of all her interest and title in the land now owned by her husband, George Spring, as well as in all he may hereafter be possessed of. Said tracts of land are described as follows:" (Here follows a description of the land conveyed.)

George Spring died intestate on the 22d day of March, 1885, the owner in fee of the land described in the complaint in this cause, leaving the said Elizabeth Spring as his widow, and leaving neither children nor father or mother. This action is brought by his brothers and sisters of the half-blood, now living, and by the descendants of such as are dead, there being none of the whole blood, against Elizabeth and her present husband, Samuel J. Davis, and their grantees, to quiet title to the land of which the said George Spring died seized. The complaint avers the facts above set out, and proceeds upon the theory that by reason of the deeds above recited Elizabeth took no interest in the land owned by George Spring at the time of his death, and that the same descended to the appellants as the next of kin. The court sustained a demurrer to the complaint and the appellants ex-

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cepted, and the appellees had judgment for costs. It is assigned for error that the court erred in sustaining the demurrer to the complaint.

“ If a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor.” Section 2490, R. S. 1881.

Under the facts in this case, it is perfectly clear that appellee Elizabeth Davis would take the land in controversy were it not for the deeds above set out. *Hoffman v. Bacon*, 50 Ind. 379; *Cool v. Cool*, 54 Ind. 225; *Daugherty v. Dear-dorf*, 107 Ind. 527.

The only question, therefore, for determination here, is what effect these deeds have upon her rights as the surviving widow and heir of her husband.

It is contended by the appellants that these deeds exclude Mrs. Davis from any interest in the lands of her late husband, and that, by reason of the language therein used, she must take the land thereby conveyed to her in full satisfaction of all claims against his landed estate; while on the other hand it is contended by the appellees that, conceding these deeds to create a valid jointure, they affect her interest as widow only, and that she takes the remainder of the estate as the sole heir of her husband. In determining this controversy it is necessary to ascertain the intention of the parties to the deeds. It was evidently their intention to make a provision for Mrs. Davis out of the lands of her husband, which should be taken by her in lieu of what she would take as his widow in the event she should survive him.

The one-third in fee which the wife takes in the lands of her deceased husband, under our statute, was doubtless intended to take the place of the dower to which she was entitled before the passage of the statute. *Hendrix v. McBeth*, 61 Ind. 473; *May v. Fletcher*, 40 Ind. 575.

Jointure has the same effect on the wife's interest which she takes under our statute that it had on her dower interest.

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By section 2504, R. S. 1881, it is provided that if before her coverture, but without her (the wife's) assent, or if after coverture, any such jointure or pecuniary provision shall be assured or given for her jointure, in lieu of her right to one-third of the lands of her husband, she shall make her election, within one year after the death of her husband, whether she will take such jointure or pecuniary provision, or whether she will retain her right to one-third of the lands of her husband; but she shall not be entitled to both.

1 Washburn on Real Property (4th ed.), p. 313, says: "In treating of dower, it has been seen that one mode of barring the claim of a widow to dower is by settling upon her an allowance previous to marriage to be accepted in lieu thereof. This is called jointure."

A jointure is merely a bar to the wife's possible right of dower. Schouler Husband and Wife, section 162. A jointure is a complete bar to the claim of dower. Bouvier Law Dictionary. An antenuptial jointure, duly accepted in writing, under our statute bars the claim of the wife to any further claims, as widow, against the lands of the husband. *Craig v. Craig*, 90 Ind. 215.

In our opinion the deeds above set out were intended by the parties thereto as a jointure. Indeed, it is so stated in the deeds. Executed as they were during the marriage relation, and at a time when the wife had no power to bind herself by contract, it may well be doubted as to whether the contract therein contained could be enforced against her without her consent thereto given after the marriage relation ceased to exist. But conceding, without deciding, that such contract is binding on her, we do not think it precludes her from taking the remainder of her late husband's estate as heir. In the case of *Sutherland v. Sutherland*, 69 Ill. 481, the contract between Sutherland and his wife, made before the marriage, was similar in its terms to the contract now under consideration. It was held that while such contract barred her right to dower, still, as against the brothers and

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sisters of Sutherland, he having died without children, she took his estate as heir. Had George Spring, during his life, conveyed away or mortgaged the land in dispute, or had he left children, or made a will by which he bequeathed the property to another, a very different question from the one we are now considering would be presented. Had he left no heirs or next of kin, except his wife, it would not be contended that the land described in the complaint would escheat to the State. In our opinion it is simply a question as to who took the land by inheritance, the widow or the brothers and sisters of the half-blood. We think it descended to his widow under the terms of section 2490, R. S. 1881, *supra*. It follows, therefore, that the court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed May 8, 1889.

The Central Union Telephone Company v. Falley.

No. 13,510.

LINDEMAN ET AL. v. THE TOWN OF MONTICELLO.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

MITCHELL, J.—The judgment in this case is controlled by the decision in *Vinson v. Town of Monticello*, ante, p. 103.

Judgment affirmed, with costs, and five per cent. damages.

Filed Jan. 26, 1889; petition for a rehearing overruled March 26, 1889.

No. 13,511.

FOX ET AL. v. THE TOWN OF MONTICELLO.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

MITCHELL, J.—The questions in this case are the same as those in *Vinson v. Town of Monticello*, ante, p. 103.

The judgment is affirmed, with costs, and five per cent. damages, for the reasons there given.

Filed Jan. 26, 1889; petition for a rehearing overruled March 26, 1889.

No. 14,268.

THE CENTRAL UNION TELEPHONE COMPANY v. FALLEY.

From the Tippecanoe Circuit Court.

J. R. Coffroth, *T. A. Stuart* and *A. H. Thomas*, for appellant.

W. D. Wallace, *S. P. Baird* and *F. S. Chase*, for appellee.

OLDS, J.—This action was brought by the appellee against the appellant, under the act of April 8th, 1885, entitled "An Act prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons, providing penalties therefor, and declaring an emergency," for the penalty of one hundred dollars for the failure and refusal on the part of the appellant to furnish to the appellee a telephone and telephonic connections, facilities and service, and involves the same questions that were decided in the case of *Central U. Tel. Co. v. State, ex rel.*, ante, p. 194. On the authority of that case the judgment of the court below is affirmed, with costs.

Filed Feb. 2, 1889; petition for a rehearing overruled April 3, 1889.

Behler et al. v. The Town of Garrett.

No. 13,569.

LINKENHELT ET AL. v. THE TOWN OF GARRETT.

From the DeKalb Circuit Court.

W. L. Penfield, for appellants.

E. D. Hartman and *L. Covell*, for appellee.

MITCHELL, J.—The decision of this case is controlled by the judgment given in *Wagner v. Town of Garrett, ante*, p. 114.

The judgment is affirmed, with costs.

Filed March 28, 1889.

No. 13,570.

MUNN v. THE TOWN OF GARRETT.

From the DeKalb Circuit Court.

W. L. Penfield, for appellant.

E. D. Hartman and *L. Covell*, for appellee.

MITCHELL, J.—The questions in this case are the same as those decided in *Wagner v. Town of Garrett, ante*, p. 114. On the authority of that case the judgment is affirmed, with costs.

Filed March 28, 1889.

No. 13,571.

BEHLER ET AL. v. THE TOWN OF GARRETT.

From the DeKalb Circuit Court.

W. L. Penfield, for appellants.

E. D. Hartman and *L. Covell*, for appellee.

MITCHELL, J.—The decision of this case is controlled by the judgment in *Wagner v. Town of Garrett, ante*, p. 114. The judgment is affirmed, with costs.

Filed March 28, 1889.

Gertz v. The Town of Monticello.

No. 13,572.

SCHULTHEIS v. THE TOWN OF GARRETT.

From the DeKalb Circuit Court.

W. L. Penfield, for appellant.

E. D. Hartman and *L. Covell*, for appellee.

MITCHELL, J.—Upon the authority of *Wagner v. Town of Garrett*, ante, p. 114, the judgment in this cause is affirmed, with costs.

Filed March 28, 1889.

No. 13,581.

BUNDY v. WILLIAMS.

From the Hancock Circuit Court.

L. H. Reynolds and *W. A. VanBuren*, for appellant.

E. Marsh and *W. W. Cook*, for appellee.

MITCHELL, J.—The reasons upon which the judgment was affirmed in *Bundy v. McClarnon*, ante, p. 165, require an affirmance of the judgment in the present case.

Judgment affirmed, with costs.

Filed March 30, 1889.

No. 13,509.

GERTZ v. THE TOWN OF MONTICELLO.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellant.

MITCHELL, J.—The questions presented in this case are identical with those involved in *Vinson v. Town of Monticello*, ante, p. 103. On the authority of that case the judgment is affirmed, with costs, and five per cent. damages.

Filed Jan. 26, 1889; petition for a rehearing overruled March 26, 1889.

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5. *Same.—Local Self-Government.—Right of the People.*—The right of the people to govern themselves, as to matters which are purely local, through the medium of local municipal governments and officers chosen by themselves, was not surrendered upon the adoption of the Constitution, but is still vested in them, and it can not be taken away by the Legislature. *Ib.*
6. *Same.—Cities.—Public Works.—Legislative Interference.—Invalid Act.*—The act of March 8th, 1889 (Acts of 1889, p. 247), assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works to be chosen by the Legislature from residents of the cities affected, is void, as denying the right of local self-government. *Ib.*
7. *Metropolitan Police and Fire Department.—Act of March 7th, 1889.—Amendatory Act.*—The act of March 7th, 1889 (Acts of 1889, p. 222), providing for a board of metropolitan police and fire department in cities of twenty-nine thousand inhabitants, is not an amendatory act, but a new and independent one, and is, therefore, not in violation of section 21, article 4 of the Constitution, which provides that no act shall be revised or amended by reference to its title, but that the act revised or section amended shall be set forth in full. *City of Evansville v. State, ex rel., 426*
8. *Same.—Subject of Act.—Constitutional Requirement.*—The purpose of the Legislature in the passage of the act mentioned being to consolidate the police and fire departments under one management, the act, as it only embraces matters relating to that subject, does not violate section 19, article 4 of the Constitution, which requires that every act shall embrace but one subject and matters properly connected therewith. *Ib.*
9. *Same.—General Law.—Uniform Operation.—Question for Legislature.*—It is for the Legislature and not for the courts to determine whether an act is in violation of section 23, article 4 of the Constitution, which provides that where a general law can be passed it shall be general and operate uniformly throughout the State. *Ib.*

10. *Same.—Authentication of Act.—Passage over Veto.*—Where an act is passed by both branches of the General Assembly, duly signed by the presiding officers and presented to the Governor, who vetoes it, after which it is reconsidered and passed by both houses, over the Governor's objections, in accordance with the constitutional requirements (section 14, article 5), it thereby becomes a law, without being again signed by the presiding officers or presented to the Governor to be by him filed in the office of the secretary of state. *Ib.*
11. *Same.—Special Privileges and Immunities.—Right to Hold Office.—Residence and Political Tests.*—The act of March 7th, 1889, *supra*, in so far as it provides that the members of the boards thereby created shall be elected from opposite political parties and shall have resided in the cities affected for five years preceding their election, and that the members of the police and fire forces to be organized by them shall be chosen equally from the two leading political parties in such cities, is in violation of section 23, article 1 of the Constitution, which prohibits the Legislature from granting to any citizen or class of citizens special privileges or immunities. *Ib.*
12. *Same.—Cities and Towns.—Local Self-Government.—Legislature may not Take Away.*—The right of the inhabitants of cities and towns to control their local affairs can not be taken away by the Legislature, and the act of March 7th, 1889, placing the police and fire departments of certain cities, and the property connected therewith, together with the purchase of all supplies, etc., under the exclusive control of commissioners to be elected by the Legislature, is void, as being a denial of the right of local self-government. *Ib.*
13. *Same.—Appointment to Office.—Vacancy.—Power of Legislature.*—The Legislature of this State has no power to fill a vacancy occurring in an office, whether of its own creation or otherwise, unless express provision therefor can be found in the Constitution. *Ib.*
14. *Same.—Appointment an Executive Function.*—The power to appoint to office is an executive function, and while the Legislature may provide by law for the appointment of all officers not provided for in the Constitution, the appointing power must be lodged somewhere within the executive department of the government. *Ib.*
15. *Same.—Local Officers.—Legislature may not Appoint.*—By force of section 18, article 5, and section 1, article 15 of the Constitution, the power to appoint certain officers of the State is reserved to the Legislature, but that department has no authority to appoint local officers, whether county, township, city or town, and the act of March 7th, 1889, assuming to confer upon it authority to appoint police and fire commissioners for cities, is void. *Ib.*
16. *Authentication of Act.—Passage Over Veto.*—Where a bill, which has been passed by both houses of the General Assembly and duly signed by the presiding officers thereof, is vetoed by the Governor, and afterwards reconsidered by the General Assembly and passed over the Governor's objections, in accordance with section 14 of article 5 of the Constitution, it becomes a law without being attested a second time by the presiding officers. *State, ex rel., v. Denny, 449*
17. *Same.—Legislative Journals.—Evidence of Passage of Act.*—The journals of the two houses of the General Assembly, upon which the Governor's objections to a bill are required to be entered, and which show the passage of the bill notwithstanding such objections, are public records, to which the court may look, and are proper evidence of the passage of the bill over the veto. *Ib.*
18. *Municipal Corporations.—Local Self-Government.—Appointment to Office.—Power of Legislature.*—The right of local self-government in

towns and cities was not surrendered upon the adoption of the Constitution, but is still vested in the people of the respective municipalities, and the Legislature can not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and the duties of the officers. *Ib.*

19. *Same.—Fire Department.—Local Control.—Legislative Interference.*—The right to provide and maintain a fire department in towns and cities is vested in the inhabitants of the respective municipalities, as an element of local self-government, and is not subject to legislative interference, except in so far as the General Assembly may prescribe rules to aid the people in the exercise of such right. *Ib.*
20. *Same.—Police and Fire Act of March 7th, 1889.—Invalidity of.*—The act of March 7th, 1889 (Acts of 1889, p. 222), creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the Legislature, and giving them exclusive control of the police and fire departments of such cities and of matters connected therewith, is void, in so far as it relates to the fire department, as being in violation of the right of local self-government; and as the provisions of the act in relation to the police department are so connected with and dependent upon its other provisions as to be practically inseparable, the whole act falls. *Ib.*
21. *Same.—Special Privileges and Immunities.—Right to Hold Office.—Residence and Political Tests.*—The provision in the act of March 7th, 1889, *supra*, that the commissioners of the police and fire departments therein provided for shall have resided in the city for which they are elected for five years next preceding their election, and that the members of the police and fire forces to be organized under said act shall be chosen equally from the two leading political parties of the city, is in violation of section 23 of article 1 of the Constitution, which prohibits the granting of special privileges or immunities. *Ib.*

CONTINUANCE.

See DEPOSITION, 4.

CONTRACT.

See ADMINISTRATOR'S SALE; BANKS AND BANKING, 2; BENEFIT SOCIETY; CHECK; COUNTY COMMISSIONERS, 2, 3; DAMAGES, 1; FRAUD, 2, 3; HUSBAND AND WIFE, 3; LANDLORD AND TENANT; PARENT AND CHILD; PARTNERSHIP; PROMISSORY NOTE, 6; RAILROAD, 3, 8 to 10; REAL ESTATE, 1, 4, 5; SHERIFF'S SALE, 3; TELEGRAPH.

1. *Guaranty Deposit.—Agreement to Refund.*—Where a street railway company is given permission by the board of county commissioners to lay its track along a public highway, and is required to deposit in the county treasury a certain sum of money, which is to be repaid upon the performance by it of certain conditions, it can only recover the money so deposited by showing a performance of the conditions, or a legal excuse for not doing so.
Board, etc., v. South Bend, etc., Street R. W. Co., 68
2. *Same.—Onerous Conditions.—Excuse for Non-Performance.*—The fact that the performance of the stipulated conditions by the railway company will put it to great inconvenience and cause it a large outlay of money, is not a sufficient excuse for the non-performance of its agreement. *Ib.*
3. *Against Public Policy.—Administrator's Sale.—Agreement not to Bid.*—An agreement entered into for the purpose of preventing competition at an administrator's sale, is unlawful and void. *Goldman v. Oppenheim, 95*
4. *Incomplete Writing.—Parol Contract.—Pleading.*—Where a letter neither

contains nor purports to contain the entire contract between the parties, but, on the contrary, points to extrinsic facts, the contract is not a written, but a parol one, and it is proper to declare on it as such.

Louisville, etc., R. W. Co. v. Reynolds, 170

5. *Same.—Attorney.—Compensation for Services.*—Where a railroad company contracts to pay an attorney reasonable fees "for assisting in trials in cases against the company," the right of the attorney to compensation is not limited to services rendered in "trials," in the narrowest technical meaning of the word, but he is entitled to pay for necessary services rendered in actions. *Ib.*
6. *Same.—Construction.—Acts of Parties.*—Courts will follow the construction which the parties themselves, by their acts, have put upon their own contracts. *Ib.*
7. *Partnership.—Agreement by Third Person to Pay Creditors.—Complaint.*—A complaint by partnership creditors against the members of the firm and G., wherein it is alleged that G., for the purpose of aiding the partners to defraud their creditors, took possession of the partnership property, and in consideration thereof agreed to pay all the creditors of the firm a certain per cent. of their claims, but has failed to pay the plaintiffs any part of the sum due them, wherefore a money judgment is demanded, states a good cause of action against G. for the amount which he agreed to pay. *Goldman v. Biddle, 492*
8. *Illegal Consideration.—Husband and Wife.—Divorce.—Collusive Agreement to Obtain.*—Writings executed by a husband for the benefit of his wife, in pursuance of a collusive agreement between them, whereby the wife is to institute a divorce proceeding for a cause which does not exist, thus abandoning a cause which she claims to exist, and the husband will not resist the proceeding, but will aid in procuring the divorce to be granted, are upon an illegal consideration, and not enforceable. *Stokes v. Anderson, 533*

CONVERSION.

See GUARDIAN AND WARD.

CONVEYANCE.

See DAMAGES, 1, 2; EXECUTION, 1 to 4; FRAUD, 2, 3; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE.

CORPORATION.

See PROMISSORY NOTE, 3.

COSTS.

See ARBITRATION AND AWARD, 3; DAMAGES, 2; REAL ESTATE, ACTION TO RECOVER, 2.

Taxation of.—Motion for.—Practice.—Where the plaintiff is entitled to recover some costs, there is no error in overruling a motion to tax all the costs of the action against him. *Pursley v. Wickle, 139*

COUNTY AUDITOR.

See GRAVEL ROAD, 2, 3, 7; SCHOOL FUND MORTGAGE.

COUNTY COMMISSIONERS.

See CONTRACT, 1, 2; FERRIES; GRAVEL ROAD.

1. *Ministerial Acts.*—The board of county commissioners in determining upon a change in the location of county buildings and in settling matters incidental thereto, acts in a ministerial and not in a judicial capacity. *Crow v. Board, etc., 51*
2. *Same.—Location of County Buildings.—Removal and Reconstruction.*—

Fraud.—Injunction.—The board of commissioners may contract for the removal of the county court-house and jail to a new site and for their reconstruction thereon, or for the sale of the old buildings and the erection of new ones upon a different site, and its action can be questioned only when there is an abuse of discretion amounting to fraud. *Ib.*

3. *Same.—Sale of County Property.—Notice.*—Where the board of commissioners enters into a contract, whereby the contractor is to remove the old county buildings to a new site and provide all materials that may be required to reconstruct them, in addition to that which the old buildings will furnish, there is no sale of the old buildings to the contractor, within the meaning of section 4248, R. S. 1881, and the notice of sale therein provided for is not necessary. *Ib.*

COUNTY SURVEYOR.

See DRAINAGE, 1.

COURTS.

See COMMISSIONERS OF SUPREME COURT; SUPREME COURT.

1. *Judges.—Ministerial Duties.*—Judges can not be required by the Legislature to perform ministerial duties. *Ex Parte Griffiths, 83*
2. *Same.—Constitutional Duties.—Legislature May not Add to.*—The Legislature has no power to add to the duties which are devolved upon judges by the Constitution. *Ib.*
3. *Judiciary an Independent Department.*—The judiciary is a separate and an independent department of government. Const., art. 3. *State, ex rel., v. Noble, 350*
4. *Same.—Constitutional Powers.*—The courts are exclusively invested by the Constitution with the whole judicial power of the State, as such power existed when the Constitution was framed. Const., art. 7, sec. 1. *Ib.*
5. *Same.—Assistants.—Selection of.*—Neither the Governor nor the Legislature can select persons to assist the courts in the performance of their judicial duties. *Ib.*
6. *Same.—Courts Choose Assistants.*—Where assistants are necessary to enable judges to discharge their judicial functions, the power to choose such assistants resides in the court.

CRIMINAL LAW.

See INTOXICATING LIQUOR, 2.

1. *Evidence.—Objection.—Waiver.*—By failing to object to a competent question the adverse party does not waive his right to move to strike out the answer, or such part of it as may be incompetent. *Jones v. State, 39*
2. *Same.—Motion to Strike Out Evidence.*—It is not error to overrule a motion to strike out evidence where part of the evidence embraced in the motion is competent. *Ib.*
3. *Rape.—Good Character of Defendant.—Examination of Witnesses.*—In a prosecution for rape, it is proper to refuse to permit a witness, who testifies to the defendant's good character, but who admits on cross-examination that he has heard charges against him, to be asked, on re-examination, if he ever heard any of his neighbors say that they believed the defendant was guilty of any outrage in a blackberry patch. *Ib.*
4. *Conviction of Assault and Battery under Indictment for Rape.*—A defendant may be convicted of assault and battery under an indictment charging him with having committed a rape. *Ib.*

5. *Involuntary Manslaughter.—Railroad Engineer.—Negligently Running Engine into Passenger Car.*—Where a railroad engineer, while engaged in operating the engine in his charge, carelessly and negligently runs the same into a passenger car standing upon the railroad track, thereby causing the destruction of the car and the death of a passenger therein, he is guilty of the offence of involuntary manslaughter, as defined by section 1908 R. S. 1881. *State v. Dorsey, 167*
6. *Assault and Battery.—Affidavit.—Sufficiency of.*—An affidavit charging that the defendant "did, in a rude, insolent, angry and unlawful manner, touch, beat and strike" the affiant, shows that the touching and striking were unlawful, and the pleading is not bad, although the word "unlawful" is not in the place usually assigned it. *Parker v. State, 328*
7. *Witness.—Accomplice.—May Testify for State.*—One jointly indicted with another as an accomplice in crime is a competent witness for the prosecution upon the trial of the latter, if he consents to testify. *Conway v. State, 482*
8. *Same.—Examination of Witness.—Objection to Question.—Practice.*—An objection to a competent question propounded to a witness does not reach beyond the question to an incompetent answer that may be given in response thereto. *Ib.*
9. *Same.—Evidence.—Conversation.*—A conversation in the presence of an accused, and in part of which he participated, is admissible in evidence as a whole. *Ib.*
10. *Same.—Statements Tending to Charge Crime.—Silence of Accused.*—Where a conversation involving statements tending to charge the accused with a crime takes place in his presence, and he remains silent, when the circumstances are such as to make it natural for him to speak, such conversation is competent evidence. *Ib.*
11. *Same.—Determining Competency of Evidence.*—In determining the competency of particular testimony the court is not confined to the testimony of one witness, but may look to other evidence, whether direct or circumstantial. *Ib.*
12. *Same.—Admission by Silence.*—A conversation in the presence of the accused, between his companion and another, in which the crime is spoken of and information that may enable the accused to escape is sought, is competent as tending to show an admission by silence. *Ib.*
13. *Same.—Hostile Witness.—Examination of.*—The method of examining a hostile witness is a matter almost entirely within the discretion of the trial court, and the Supreme Court will not interfere unless a clear abuse of discretion, leading to manifest injustice, is shown. *Ib.*
14. *Same.—Suggestive Questions.—Pressing Witness.*—Where a witness betrays his hostility to the State, it is proper to permit the prosecution to ask him suggestive questions and to press him with questions designed to compel him to reveal what he knows, even though such questions embarrass him and "place him in an awkward position." *Ib.*
15. *Same.—Contradiction of Witness by Evidence of Different Statements.*—Where a witness produced by the State makes statements prejudicial to the prosecution, the State may, under section 507, R. S. 1881—which, by force of section 1796, R. S. 1881, governs in criminal prosecutions—contradict him by evidence of different statements made out of court. *Ib.*
16. *Same.—Influencing Witness.—Offering to Give Money.*—Evidence of a conversation between the accused and another, in which the former offered to pay the latter "three hundred dollars if he would say that he had done the cutting in self-defence," is competent as an admission,

and as showing an attempt to influence a witness to give favorable testimony. *Ib.*

17. *Same.—Expert Witness.—Cross-Examination of.—Hypothetical Question.—* It is proper for counsel for the State, on the cross-examination of an expert witness, to assume facts, within the range of the evidence, which they believe proved, and on this assumption ask for an opinion from the witness. *Ib.*
18. *Same.—Criminal Responsibility.—Weakness of Intellect.—* Mere weakness of intellect will not shield one who commits a crime; if the will power is not overthrown by disease, and there is sufficient mental capacity to know right from wrong, there is criminal responsibility. *Ib.*
19. *False Pretences.—Felonious Intent.—* To sustain a charge of obtaining goods by false pretences a felonious intent must be shown. *State v. Fields, 491*
20. *Rape.—Consent.—Reputation for Chastity.—Instruction.—* Where, in a prosecution for rape, the defendant claims that the intercourse was with consent, it is material error to instruct the jury that evidence of the bad reputation of the prosecuting witness for chastity was introduced only for the purpose of affecting her credibility as a witness. *Carney v. State, 525*

DAMAGES.

See CHATTEL MORTGAGE, 6, 7, EVIDENCE, 3; GUARDIAN AND WARD, 10, 11; MALICIOUS PROSECUTION, 5; MASTER AND SERVANT; NEGLIGENCE, 1; PARENT AND CHILD; RAILROAD; SHERIFF'S SALE, 3; SLANDER, 3.

1. *Exchange of Lands.—Fraud.—Contract.—Right of Action.—* An action to recover damages resulting from the fraudulent representations of the defendant in an exchange of lands is not based upon the contract of exchange, but upon the fraud by which the plaintiff was induced to enter into it. *Griffin v. Moore, 52 Ind. 295, and Coon v. Vaughn, 64 Ind. 89, distinguished. Pursley v. Winkle, 139*
2. *Same.—Costs.—How Adjudged.—* In such a case, the costs are to be adjudged as provided in section 592, R. S. 1881, and if the plaintiff recovers less than five dollars damages, he is entitled to recover no more costs than damages. *Ib.*
3. *Civil Action.—Charge Involving Crime.—Proof.—Preponderance of Evidence.—Reasonable Doubt.—* In an action to recover damages for the destruction of property, which it is alleged the defendant wilfully and unlawfully set fire to, the plaintiff is only required to prove his case by a preponderance of the evidence, and not beyond a reasonable doubt. *Hale v. Matthews, 527*
4. *Same.—Presumption of Innocence.—Instruction to Jury.—* While a presumption of innocence attaches to the defendant, and is a proper subject for consideration by the jury, the failure of the court to specifically charge the jury in relation to such presumption does not constitute error where they are instructed generally that the law presumes that every one acts lawfully and honestly. *Ib.*

DEBTOR AND CREDITOR.

See CONTRACT, 7; EXECUTION; FRAUDULENT CONVEYANCE.

DECEDENTS' ESTATES.

See ADMINISTRATOR'S SALE; SHERIFF'S SALE, 8; WILL; WITNESS.

DEED.

See DELIVERY; HUSBAND AND WIFE.

DELIVERY.

See PROMISSORY NOTE, 6, 7.

Written Instrument.—What Does not Constitute Delivery.—S. signed a deed, bill of sale and promissory note, and left them upon the table. He neither said nor did anything to indicate an intention to deliver them; on the contrary, the circumstances show that he did not want to execute the writings at that time. He reserved the right to examine them on the next day, and it was agreed that if they were found incorrect, corrections should be made. While the papers were so lying upon the table, one of the persons named therein took them up and gave them to his clerk, with instructions to put them in his vault.

Held, that there was no delivery.

Stokes v. Anderson, 533

DEMAND.

See TELEGRAPH, 9.

DEMURRER TO EVIDENCE.

Effect of Demurrer.—By demurring to the plaintiff's evidence the defendant admits the truth of all the evidence adduced by the plaintiff, and all inferences that may reasonably be drawn from it, and withdraws from consideration all favorable evidence, except upon points where there is no conflict.

Pennsylvania Co. v. Stegemeier, 305

DEPOSITION.

1. *Publication After Trial has Commenced.*—A party has the right to have a deposition taken by him published after the trial has commenced, although it has been regularly on file for forty-two days.

Mitten v. Kitt, 145

2. *Same.—Delay in Moving for Publication.*—As either party may move to publish a deposition, neither can complain of delay on the part of the other in making the motion.

Ib.

3. *Defective Certificate.—Return to Officer for Correction.*—Where it is discovered after the publication of a deposition that the seal of the officer before whom the same was taken is not attached to his certificate, the court may, although a motion to quash is made, order the deposition to be returned to the officer in order that the omission may be supplied.

Hale v. Matthews, 527

4. *Same.—Time of Filing.—Continuance.*—If in such case the deposition be returned, properly certified, during the trial of the cause, and is to be regarded as having been filed as of the date of its return, the opposite party, under section 436, R. S. 1881, is entitled to a continuance, upon a proper motion therefor.

Ib.

DESCENT.

See HUSBAND AND WIFE, 4.

DESECRATION OF THE SABBATH.

See TELEGRAPH.

DEVISE.

See WILL.

DISCRETIONARY POWER.

See COUNTY COMMISSIONERS, 2; DRAINAGE, 1; STATE FINANCE.

DIVORCE.

See CONTRACT, 8.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MASTER AND SERVANT;
PARENT AND CHILD.

DRAINAGE.

See HIGHWAY.

1. *Repairs.—Discretion of County Surveyor.—Act of 1885.*—The propriety of repairing a public ditch is committed by section 10 of the act of April 6th, 1885 (Acts of 1885, p. 141), to the discretion of the county surveyor, and his decision is final. *Kirkpatrick v. Taylor, 329*
2. *Same.—Appeal from Assessment.—Questions Determined upon.*—Upon an appeal by a land-owner from an assessment made under the provisions of section 10 of the act of 1885, it is proper to determine whether the appellant's land is subject to assessment for repairs. *Ib.*
3. *Complaint to Enforce Assessment.*—For a complaint by a commissioner of drainage to enforce the lien of a drainage assessment, which is held to be sufficient on demurrer, see opinion. *Chaney v. State, ex rel., 494*
4. *Same.—Report of Commissioners.—Power to Set Aside.*—While a drainage proceeding is *in fieri*, the court has power to set aside the report of the commissioners and order a further consideration of the petition, and its action in doing so is at most only erroneous, and can not be collaterally questioned. *Ib.*
5. *Same.—Parties.—Notice.*—Where an answer to a complaint to enforce a drainage assessment alleges that the land affected was described in the petition for the drainage, but that the defendant was not named therein and neither had notice of nor appeared to the proceeding, but fails to show that he held the legal title to the land when the petition was filed, is bad. *Ib.*
6. *Same.—Purchaser Pendente Lite.*—A purchaser of land during the pendency of a petition for drainage, from a grantor who is named in the petition and has notice thereof, is bound by the proceedings to the same extent as though he had held the legal title when the petition was filed and had been named therein and duly notified. *Ib.*
7. *Same.—Lien of Assessment.—Constructive Notice.*—Under section 5 of the drainage act of 1883 (Acts of 1883, p. 179), the lien of an assessment attaches as of the date of the petition, and a purchaser *pendente lite* is affected with notice. *Ib.*
8. *Same.—Notice.—Presumption.*—To a complaint to enforce an assessment, an answer alleging a purchase of the land by the defendant after the petition for drainage was filed, and that the defendant was not a party to the drainage proceeding and had no notice, is bad, as the presumption is that his grantor was a party and was duly notified. *Ib.*
9. *Same.—Exhibit.—When Deemed Amended.*—Where an exhibit might have been amended in the trial court to conform it to the proof, it will be presumed, on appeal, that it was so amended. *Ib.*
10. *City.—Establishment of Ditch in.—Jurisdiction.—Collateral Attack.*—The jurisdiction of the circuit court to establish a ditch, under the drainage law of 1881, partly within the limits of an incorporated city, and levy benefit assessments upon city property, can not be questioned by a property-owner in a suit to collect an assessment. *State, ex rel., v. Jackson, 553*

DUE PROCESS OF LAW.

See ASSESSMENT.

EJECTMENT.

See HUSBAND AND WIFE, 2; LANDLORD AND TENANT; PLEADING, 1;
REAL ESTATE, 2, 7; REAL ESTATE, ACTION TO RECOVER; TRIAL, 3.

ESCROW.

See PROMISSORY NOTE, 7.

ESTOPPEL.

See GUARDIAN AND WARD, 8; RAILROAD, 7; STREETS AND ALLEYS, 2; WAREHOUSEMAN.

1. *Mortgage.—Representation of Title.*—One who represents to a third person, upon inquiry, that he has sold certain land to another, who is in possession thereof, and that the latter has sufficient title to support a mortgage to secure money which he proposes to borrow from the inquirer, is estopped, in a suit to foreclose a mortgage taken in reliance upon his representations, to deny that the mortgagor had title.
Wischart v. Hedrick, 341
2. *Same.—Fraud.—Preconceived Design.*—An estoppel may arise where there is no preconceived design to deceive or mislead; the fraud consists in denying a representation upon which another has acted, and the repudiation of which will entail loss upon him. *Ib.*

EVIDENCE.

See ARBITRATION AND AWARD, 4; CONSTITUTIONAL LAW, 17; CRIMINAL LAW, 1 to 3, 7 to 17; DEMURRER TO EVIDENCE; DEPOSITION; LANDLORD AND TENANT; MALICIOUS PROSECUTION, 1 to 3; MORTGAGE, 1; PRACTICE, 1, 2; RAILROAD, 7, 11; SLANDER, 4; TELEGRAPH, 10; WITNESS.

1. *Telegram.—Parol Evidence of Contents.*—Where it does not appear that a message given to a telegraph operator for transmission was in writing, it can not be held that parol evidence of the contents of the message was improperly admitted.
Terre Haute, etc., R. R. Co. v. Stockwell, 98
2. *Same.—Harmless Error.*—There is no available error in admitting parol proof of the contents of a telegram where it is in evidence that the information contained therein was orally communicated by the sender of the message to the receiver. *Ib.*
3. *Admissibility of.—Must be Embraced within the Issues.*—Under a complaint seeking a recovery for damages occasioned by the overflowing of the plaintiff's land, washing away tiling, etc., evidence is not admissible as to any expense incurred by the plaintiff in his efforts to keep the water off of his land, such an issue not being embraced within the pleadings. *Robinson v. Shanks, 125*
4. *Irrelevant Testimony.—Rebuttal of.*—If testimony is erroneously admitted in rebuttal of irrelevant testimony introduced by the other party, it is a harmless error, for which the cause will not be reversed. *Ib.*
5. *Conflicting Evidence.—Setting Aside of Verdict.*—Where the evidence in a cause is conflicting, the verdict will not be disturbed on the weight of the evidence. *Ib.*
6. *Admissions against Interest.*—The admissions of a party against his interest are competent as independent and substantive evidence, and can not be limited to the question of credibility.
Logansport, etc., T. P. Co. v. Heil, 135
7. *Same.—Party May not Introduce His Own Declarations.*—Where the defendant introduces self-disserving admissions of the plaintiff, the latter can not give his own declarations in evidence in support of his case. *Ib.*
8. *Motion to Strike Out.—Practice.*—A motion to strike out the testimony of a witness upon a given subject, as a whole, should be overruled if a part of such testimony is competent. *Snideman v. Snideman, 162*
9. *Real Estate.—Trust.—Payment of Taxes.*—In an action seeking to estab-

lish a trust in land, receipts showing that the person sought to be declared a trustee paid the taxes on the land while it was in his possession, is competent. *Martin v. Martin*, 227

10. *Long-Hand Manuscript of.—Bill of Exceptions.—Practice.*—In order to make the official reporter's long-hand manuscript of the evidence a part of the record, it must be incorporated in a formal bill of exceptions. *Butler v. Roberts*, 481
11. *Civil Action.—Charge Involving Felony.—Preponderance of Evidence.*—The plaintiff in a civil action is required to prove his case by a preponderance of the evidence only, although his complaint may involve a charge of crime. *Hale v. Matthews*, 527

EXAMINATION OF WITNESS.

See CRIMINAL LAW, 3, 8, 13, 14, 17.

EXCESSIVE DAMAGES.

See MALICIOUS PROSECUTION, 5; RAILROAD, 15.

EXECUTION.

See CHATTEL MORTGAGE; JUDGMENT, 8.

1. *Lien.*—Property not subject to an execution is not subject to its lien. *Ray v. Yarnell*, 112
2. *Same.—Exemption.—Conveyance by Debtor.—Sheriff's Sale.*—A judgment debtor may convey real estate which he claims as exempt from execution, and one who purchases the property at sheriff's sale under the judgment acquires no title as against the prior grantee of the debtor, whose deed is duly recorded. *Ib.*
3. *Same.—Alias Execution.—Additional Schedule.*—A purchaser of exempted property from a judgment debtor, having recorded his deed, is not bound to oppose the issue of executions or to secure additional schedules from his grantor. *Ib.*
4. *Same.—Notice.—Means of Knowledge.*—A purchaser who has the means of knowledge, in legal contemplation has knowledge, and can not be deemed an innocent purchaser. *Ib.*
5. *Supplementary Proceedings.—Affidavit.—Amendment.*—The affidavit in proceedings supplementary to execution may be amended. *Burkett v. Bowen*, 379
6. *Same.—Return of Nulla Bona.*—The sheriff's return, showing no property found subject to execution, justifies a resort to supplementary proceedings. *Ib.*
7. *Same.—Choses in Action in Possession of Third Person.*—Choses in action belonging to the execution defendant and in the possession of a third person are properly reachable by proceedings supplementary to execution. *Ib.*
8. *Same.—Change of Venue.*—A change of venue may be granted in proceedings supplementary to execution. *Ib.*
9. *Same.—Question of Ownership.—Determination of.*—Where the affidavit in supplementary proceedings alleges that property belonging to the execution defendant is in the possession of a third person, it is competent to try and determine the question of ownership. *Ib.*

EXECUTIVE POWERS.

See CONSTITUTIONAL LAW.

EXECUTIVE VETO.

See CONSTITUTIONAL LAW, 10, 16, 17.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATOR'S SALE; FRAUDULENT CONVEYANCE, 3.

EXEMPLARY DAMAGES.

See GUARDIAN AND WARD, 11; SLANDER, 3.

EXEMPTION FROM EXECUTION.

See EXECUTION, 1 to 3.

EXHIBIT.

See PLEADING, 9, 12, 13; PRACTICE, 1.

EXPERT AND OPINION EVIDENCE.

See CRIMINAL LAW, 17.

FALSE IMPRISONMENT.

See MUNICIPAL CORPORATION, 1, 2.

FALSE PRETENCES.

See CRIMINAL LAW, 19.

FERRIES.

1. *License.—Interstate Waters.*—A State may, either directly or through a grant of power delegated to a municipal corporation, exact reasonable license fees from the keepers of ferries living within the State, although their boats ply between landings lying in two different States. *City of Madison v. Abbott, 337*
2. *Same.—Municipal Regulation.*—The common council of a city may prescribe reasonable regulations for the government of interstate ferries, and may designate the time and place of landing, consistently with the general law and with such regulations as the board of county commissioners is authorized to make. *Ib.*
3. *Same.—Time of Running.—Exclusive Control of County Commissioners.—City Ordinance.*—The board of commissioners of the proper county is exclusively authorized by statute to regulate the hours during which a licensed ferryman, whose boat runs to and from points without the limits of the State, is required to keep his ferry open and run his boats, and a city ordinance prescribing inconsistent regulations is not enforceable. *Ib.*

FISCAL AFFAIRS.

See STATE FINANCE.

FRAUD.

See COUNTY COMMISSIONERS, 2; DAMAGES, 1, 2; ESTOPPEL; MORTGAGE, 3, 4; PROMISSORY NOTE, 9, 10; TRADE-MARK, 2.

1. *Proof.—Instruction to Jury.*—An instruction that "fraud is never presumed, but the burden rests upon one charging fraud to make it out by clear and convincing evidence," is not open to the objection that it misled the jury by conveying an impression that fraud must be proved beyond a reasonable doubt. *Wallace v. Mattice, 59*
2. *Conveyance of Land.—Representations.—Fraudulent Concealment.*—Where one represents to another that he is entitled to a full third of the estate left by his deceased father, and fraudulently conceals from the other the fact that, by reason of advancements made to him by his father, he has no interest in such estate, and thereby induces the other party, who relies upon the representations, to convey land to him upon receiving a quitclaim deed for such supposed interest, there is such fraud as gives a right of action. *Craig v. Hamilton, 565*
3. *Same.—Acting on Own Judgment.—Instruction to Jury.*—But if, in such

case, the plaintiff did not rely upon the representations made to him by the defendant, but sought and obtained information from other sources, and then, acting on his own judgment, concluded to enter into the contract and take his chances as to what he would get by reason thereof, he is not entitled to recover, and it is error to refuse to so instruct the jury. *Ib.*

FRAUDULENT CONVEYANCE.

See SHERIFF'S SALE, 2.

1. *Lien.—Real Estate.—Conveyance without Consideration.—General Debts of Grantor.*—The general debts of a party who conveys land without consideration are not a lien upon the land. *Hays v. Montgomery, 91*
2. *Complaint.*—A complaint to set aside a conveyance as fraudulent as against creditors must allege that the conveyance was made to defraud. *Ib.*
3. *Same.—Parties.—Administrator.*—An administrator of a debtor who dies without heirs is a necessary party defendant to an action by creditors to set aside, as fraudulent, a conveyance made by the debtor. *Ib.*
4. *Same.—Agreement to Support Grantor.—Fraudulent Intent.—Notice.*—A conveyance made in consideration of an agreement by the grantee to support the grantor for life, is valid, unless made with intent to defraud creditors, of which intent the grantee has notice at the time of the conveyance. *Ib.*

GRAVEL ROAD.

1. *Free.—Order Directing Reassessment.—Right of Appeal.*—An appeal will lie from an order of the board of commissioners directing a reassessment to pay the expense of constructing a free gravel road. *Campbell v. Board, etc., 119.*
2. *Same.—County Auditor.—Authority to Increase Assessment.—Ratification.*—The county auditor has no authority to increase an assessment beyond the sum ascertained and assessed as benefits in due course of law, and his act in doing so is not validated by a mere ratification thereof by the board of commissioners. *Ib.*
3. *Same.—Statute Construed.*—Section 5096, R. S. 1881, must be construed as meaning that the auditor can only add to the assessment when it appears that the addition will not make the assessment exceed the benefits ascertained and reported in compliance with the statute. *Ib.*
4. *Expense of Constructing.—Limitation of Assessment.*—It is only the legitimate expense of constructing a free gravel road that can be assessed against the land-owners. If the board of commissioners exceeds its authority, the county must either bear the loss or compel the commissioners to account. *Board, etc., v. Fullen, 158*
5. *Same.—Allowances.—Appeal.*—Land-owners are not bound to appeal as each allowance is made, but they have a right to wait until final judgment is entered and then appeal. *Ib.*
6. *Same.—Appeal from Reassessment.—Questions Presented.*—By an appeal from the final order made by the board of commissioners in proceedings to reassess the property benefited by the construction of the road, all questions affecting the amount of the second assessment may be brought before the court. *Ib.*
7. *Same.—Auditor not Entitled to Compensation.*—There is no law providing that the county auditor shall receive compensation for services rendered by him in proceedings under the act of 1877 for the construction of a free gravel road, and he can not be allowed compensation as a part of the expense of constructing the road. *Ib.*

8. *Same.—Attorneys' Fees.*—The fees of attorneys employed by the board of commissioners can not be charged against the land-owners, in cases where the courts decide that they had just cause for resisting an assessment. *Ib.*

GUARANTY.

See CONTRACT, 1, 2; PROMISSORY NOTE, 5.

GUARDIAN AND WARD.

1. *Appointment of Guardian.—Irregularity.—Bond.*—An irregularity in the appointment of a guardian is not available as a defence to an action upon his bond. Section 2516, R. S. 1881. *Peelle v. State, ex rel., 512*
2. *Conversion.—Statute of Limitations.*—In an action by a ward upon his guardian's bond for money converted, the statute of limitations is only available as a defence from the date of the conversion and not from the date of prior breaches of duty. *Ib.*
3. *Guardian not a "Public Officer."*—A guardian is not a public officer within the meaning of the second subdivision of section 293, R. S. 1881, limiting the time for the bringing of actions upon the bond of such an officer to five years. *Ib.*
4. *Case Doubted.*—It is questionable whether the decision in *Jones v. Jones*, 91 Ind. 378, is not unsound in so far as it holds that an action on a guardian's bond must be brought within six years after the cause of action accrues. *Ib.*
5. *Accounting.—Insufficient Answer of Settlement.*—To a complaint upon a guardian's bond, an answer that all sums of money received by the guardian were paid to the relator "after his arrival at twenty-one years of age, by his guardian, and were paid out to others for the relator's schooling and board," is bad, as it neither shows a payment of the entire sum to the ward nor a right to pay money out for the purposes mentioned. *Ib.*
6. *Removal from State.—Remedy of Ward.*—Where a guardian removes from the State during the minority of his ward, the failure of the latter to then institute an action upon his bond does not bar or affect the ward's right to subsequently sue upon a cause of action accruing to him by the guardian's failure to account when he becomes of age. *Ib.*
7. *Penalty of Bond.—Mistake.*—An error of judgment made by the county clerk in fixing the penalty of a guardian's bond at too large a sum, is a mistake of law and can not be corrected by the courts. *Ib.*
8. *Estoppel of Obligors.*—Where the obligors in a guardian's bond have treated the bond as valid, and have permitted the guardian to receive a large sum of money without questioning the amount of the penalty, they can not afterwards have the penalty reduced to the injury of the ward. *Ib.*
9. *Several Judgment Against Sureties.*—In an action upon a joint and several guardian's bond, a failure to obtain service upon the principal does not defeat the right to a judgment against the sureties. *Ib.*
10. *Measure of Damages.—Interest.—Penalty.*—Where the breach relied on is the failure of the guardian to account to the ward when he became of age, and it does not appear that the guardian actually received and appropriated interest, the measure of recovery, as against the sureties at least, is the amount due, including simple interest, to which the court may, if it deems it proper in the particular case, add ten per centum penalty. *Ib.*
11. *Exemplary Damages.*—Exemplary damages can not be awarded against unoffending sureties in a guardian's bond. *Ib.*

HIGHWAY.

See RAILROAD, 1, 2, 4 to 7.

1. *Drainage of.—Right to Enter upon Private Lands.*—Under section 16 of the act of 1883 relating to highways (Acts of 1883, p. 66), a ditch may be located on private lands only when suitable drainage can not be had in the roadway at the same expense. *Cable v. Hultz, 13*
2. *Same.—Selection of Location.—Duty of Supervisor.*—If suitable drainage can not be had in the roadway, the land-owner may select the location of the ditch, and if the selection is accessible and suitable it is the duty of the supervisor to adopt it, but if the land-owner fails to point out the location, or if his selection is not accessible or suitable, the supervisor may make the location. *Ib.*
3. *Same.—Irreparable Injury.—Injunction.*—If any question is made as to whether proper drainage can be had in the highway, or as to whether a location selected by the land-owner is a suitable one, the land-owner has a right to have it determined in a judicial proceeding, and he may maintain injunction to prevent irreparable injury. *Ib.*
4. *Same.—When Supervisor a Wrong-Doer.*—The supervisor is a wrong-doer if he undertakes to construct a ditch on private lands when proper drainage can be had in the roadway, or, when it is necessary to go upon private grounds, if he refuses to accept a suitable location selected by the land-owner and locates the ditch elsewhere, and injunction will lie to prevent an injury from being inflicted upon the land-owner which can not be fully compensated in damages. *Ib.*

HUSBAND AND WIFE.

See CONTRACT, 8.

1. *Tenants by Entireties.—Quitclaim Deed from Husband to Wife.—Effect of.—Survivorship.*—Where a husband and wife own real estate by entireties, a quitclaim deed from the husband direct to the wife, in which she does not join, but which she accepts and acts upon, is valid, and vests in the wife the whole estate in the land, and defeats the husband's right of survivorship. *Enyeart v. Kepler, 34*
2. *Wife May Maintain Ejectment against Husband.*—Under the statutes of this State, a wife may maintain an action of ejectment against her husband to recover the possession of her separate real estate. *Crater v. Crater, 521*
3. *Same.—Wife's Separate Real Estate.—Void Contract.*—A contract made by a married woman in 1866, whereby she agreed, in consideration that her husband should pay a claim against her separate real estate, that she would give him one-half of the land, to be held by them as joint tenants, was void under the law then in force (1 R. S. 1876, p. 550, section 5), and the husband acquired no enforceable right thereunder.
4. *Deed.—Jointure.—Rights of Widow as Heir.—Descent.*—A husband and wife united in conveying certain real estate to M., in trust, to be immediately conveyed by the latter to the wife, in lieu of all her interest in the other lands then owned or afterwards acquired by her husband, "as her jointure in her said husband's lands forever." On the same day, M. executed and delivered to the wife a deed for the real estate described. The husband died some years later, the owner of other real estate, and leaving neither children nor father or mother, but leaving brothers and sisters of the half-blood only.
Held, that the deeds were intended by the parties to operate as a jointure; that they affect the wife's rights as widow only; and that, under section 2490, R. S. 1881, as against the brothers and sisters of the half-

blood, she takes, as heir, the whole of the estate of which her husband died seized. *Glass v. Davis, 593*

ILLEGAL CONSIDERATION.

See CHECK; CONTRACT, 8.

INFANT.

See INTOXICATING LIQUOR, 2; PARENT AND CHILD.

INJUNCTION.

See COUNTY COMMISSIONERS, 2; HIGHWAY, 3, 4; JUDGMENT, 8; SHERIFF'S SALE, 1, 2; TRADE-MARK.

INSANITY.

See CRIMINAL LAW, 18; PARENT AND CHILD.

INSURANCE.

See BENEFIT SOCIETY.

INSTRUCTIONS TO JURY.

See BURDEN OF PROOF; CRIMINAL LAW, 20; DAMAGES, 4; FRAUD, 1, 3; PRACTICE, 2; SUPREME COURT, 3; TRIAL, 4; WATERCOURSE.

1. *When too Late to Request.*—It is not error for the court to refuse to give instructions when the request is made at the time that the court is giving its instructions to the jury. *Town of Noblesville v. Vestal, 80*
2. *Must be Considered Together.*—Instructions are to be considered as a whole, and not in detached portions. *Robinson v. Shanks, 125*
3. *Making Part of Record.*—*Bill of Exceptions.*—*Practice.*—Instructions which are not brought into the record by a bill of exceptions, or which are not signed by the judge and filed as a part of the record, will not be considered on appeal. *Butler v. Roberts, 481*

INTERROGATORIES TO JURY.

See VERDICT, 2.

INTERSTATE COMMERCE.

See TELEPHONE, 4, 6.

INTOXICATING LIQUOR.

1. *Municipal Regulation.*—*Sale, Barter or Giving Away of Liquors.*—*Ordinance Relating Thereto.*—*Validity of.*—An ordinance which prohibits the sale, barter or giving away of intoxicating liquor without a license, is valid. The substantive grant contained in the statute is the power to license, regulate and restrain the sale of intoxicating liquors, but as a necessary incident to this power is included the power to prohibit the bartering or giving away of intoxicating liquors. *Vinson v. Town of Monticello, 103*
Lindeman v. Town of Monticello, and other cases, 598, 600
2. *Criminal Law.*—*Misdemeanor.*—*Minor.*—*Giving Intoxicating Liquor to.*—*What Constitutes.*—Where a saloon-keeper, at the direction of one who pays for the liquor, delivers a glass of intoxicating liquor to a person under the age of twenty-one years, he, as well as the person paying for the liquor, is guilty of a misdemeanor. All persons who participate in an act or transaction which is a misdemeanor are alike guilty. *Topper v. State, 110*
3. *Municipal Regulation.*—*Town.*—*License.*—A town has the right to limit the licenses issued by it for the sale of intoxicating liquors to such persons as have procured and hold a license from the board of county commissioners. *Wagner v. Town of Garrett, 114*
Linkenheit v. Town of Garrett, and other cases, 599, 600

4. *Same.—Statute.—Discrimination in Granting Licenses.—Who May Complain.*—The validity of a statute can be questioned only by persons who are prejudiced by it; and hence a male inhabitant of this State can not assail the statute regulating the granting of licenses to venders of intoxicating liquors on the ground that the exclusion of women and non-residents from participation in its benefits is an unjust discrimination. *Ib.*
5. *Same.—Ordinance Valid in Part.*—The fact that an ordinance regulating the licensing of venders of intoxicating liquors requires a license for the sale of a liquor which is not the subject of municipal regulation, does not invalidate the ordinance so far as it relates to other liquors. *Ib.*
6. *Same.—Sale of Fermented Cider.—Right to Exact License.*—It seems that the sale of fermented cider, which is an intoxicating liquor, is a proper subject of municipal regulation. *Ib.*
7. *Municipal Corporation.—Jurisdiction of.—Special Tax.*—The Legislature may empower municipal corporations to lay a special tax upon persons engaged in selling intoxicating liquors, and it may also determine over what territory the jurisdiction of such corporations shall extend. *Emerich v. City of Indianapolis, 279*
8. *Same.—Restriction of Business.—Municipal Protection.*—The object of this class of legislation is to restrict the business of liquor-selling, and not to secure to the venders the protection of the municipal government, and therefore one is not exempted from the payment of the special tax because his place of business is outside of the corporate limits. *Ib.*
9. *Same.—Proximity of Business to both Town and City.*—The fact that the vender's place of business is within two miles of both a town and a city does not impair the right of the latter to exact a license fee, as its jurisdiction extends so far, while that of the town does not. *Ib.*

JOINTURE.

See HUSBAND AND WIFE, 4.

JUDGMENT.

See GUARDIAN AND WARD, 9; SHERIFF'S SALE, 3; TAXES, 5; VERDICT, 1.

1. *Review of.—For What Causes Will Lie.*—A complaint to review a judgment for error apparent in the record will only lie for causes which would have been available on appeal. *Baker v. Ludlam, 87*
2. *Same.—Default While Answer is Pending.—Motion to Set Aside.*—If judgment is rendered against a defendant by default, notwithstanding he has an answer on file, he can not, in the absence of a motion to set the default aside, maintain an action for review. *Ib.*
3. *Same.—Pleading.—Theory.—Complaint for Review.*—A pleading must be good on the theory upon which it proceeds; and hence a complaint which is drawn to review a judgment will not be upheld as an application under section 396, R. S. 1881, to be relieved from the judgment, on the ground of mistake, inadvertence, etc. *Ib.*
4. *When Conclusive upon One not a Party.*—One who employs counsel and procures a matter to be litigated in the name of another, who is only nominally interested, is concluded by the judgment rendered in that case upon the matter in question. *Burns v. Gavin, 320*
5. *By Default.—Relief from.—Absence of Attorneys.*—For facts held sufficient, under section 396, R. S. 1881, to entitle a party to relief from a judgment taken against him by default, during the absence of his attorneys, see opinion. *Green v. Stobo, 332*
6. *Jurisdiction.—Collateral Attack.*—Where a court of general jurisdic-

tion has jurisdiction of the subject-matter of an action and of the parties thereto, its judgment is not void and can not be collaterally attacked, but is binding until reversed or set aside in some appropriate proceeding for that purpose. *Bateman v. Miller, 345*

7. *Same.—Presumption as to Jurisdiction.*—Where a judgment is rendered by a court having jurisdiction of the subject-matter of the action, it will be presumed, where its record is silent, that it acquired jurisdiction of the parties. *Ib.*

8. *Of Justice of Peace.—Filing Transcript.—Duration of Lien.—Execution.—Injunction.—Statute Construed.*—A judgment rendered before a justice of the peace is a lien upon the real estate of the defendant within the county from the time a transcript thereof is filed, recorded and docketed in the county clerk's office, to the end of ten years from the rendition of the judgment and not from the time the transcript is filed, and a sale upon execution issued after ten years from the rendition of the judgment will be enjoined at the suit of an intervening purchaser. Sections 608, 612 and 613, R. S. 1881, construed. *Brown v. Wuskoff, 569*

JUDICIAL POWERS.

See COMMISSIONERS OF SUPREME COURT; COURTS; REPORTER OF SUPREME COURT.

JUDICIAL SALE.

See CHATTEL MORTGAGE; EXECUTION, 2; REAL ESTATE, 6, 7; SHERIFF'S SALE.

JURISDICTION.

See DRAINAGE, 10; INTOXICATING LIQUOR, 7, 9, JUDGMENT, 6, 7; TRADE-MARK.

JURY.

See INSTRUCTIONS TO JURY; TRIAL; VERDICT.

JUSTICE OF THE PEACE.

See JUDGMENT, 8.

LANDLORD AND TENANT.

Contract.—Notice to Quit.—Evidence.—While no notice to quit is necessary where the time when the tenancy expires is fixed by written contract, yet if a notice be given, although not in the manner provided by the statute, it is admissible in evidence, in an action for possession, to show that the landlord insisted on his right to possession at the time fixed. *Snideman v. Snideman, 162*

LEGACY.

See WILL.

LEGISLATURE.

See COMMISSIONERS OF SUPREME COURT; CONSTITUTIONAL LAW; COURTS; REPORTER OF SUPREME COURT; STATE FINANCE.

LICENSE.

See FERRIES; INTOXICATING LIQUOR, 1, 3 to 9.

LIEN.

See CHATTEL MORTGAGE; DRAINAGE, 7; EXECUTION; FRAUDULENT CONVEYANCE, 1; JUDGMENT; MORTGAGE; SHERIFF'S SALE, 7, 8; STREETS AND ALLEYS, 8, 9; TAXES.

LIFE INSURANCE.

See BENEFIT SOCIETY.

LIMITATION OF ACTIONS.

See GUARDIAN AND WARD, 2 to 4, 6; STATUTE OF LIMITATIONS.

LOCAL SELF-GOVERNMENT.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATION, 3 to 8.

MALICIOUS PROSECUTION.

1. *Motive.—Probable Cause.—Evidence.*—Upon the trial of an action for malicious prosecution, it is competent for the plaintiff to introduce in evidence the pleadings in a civil suit commenced by him against the defendant shortly before the criminal prosecution was instituted, as bearing upon the question of probable cause. *Peden v. Mail, 560*
2. *Same.—Knowledge of Accused's Good Faith.*—A letter written by the plaintiff to the defendant, prior to the institution by the latter of the criminal prosecution against the former, tending to charge the defendant with knowledge that the plaintiff was acting in good faith and under a claim of right in the transaction for which he was prosecuted, is admissible. *Ib.*
3. *Same.—Partnership.—Account Books.—Erasures.—Inspection by Jury.*—Where a partner, claiming that his copartner is indebted to him on partnership account, sells property which he claims to belong to the firm and appropriates the proceeds to his own use, for which he is prosecuted criminally by his copartner, he has a right, in an action by him for malicious prosecution, to have the partnership books, in which he asserts that the defendant has made changes and erasures, exhibited in evidence for the inspection of the jury. *Ib.*
4. *Same.—Partnership Property.—When Partner May Sell and appropriate Proceeds.*—Where one partner is indebted to his copartner, the latter has the right to sell partnership property and appropriate the proceeds to his own use in satisfaction of the debt. *Ib.*
5. *Same.—Excessive Damages.*—Where it appears that the jury, in assessing the damages in an action for malicious prosecution, arrived at the amount deliberately, without the intervention of passion, partiality or prejudice, their verdict will not be disturbed as excessive. *Ib.*

MANDAMUS.

See TELEPHONE.

MANSLAUGHTER.

See CRIMINAL LAW, 5; NEGLIGENCE, 2.

MARRIED WOMAN.

See HUSBAND AND WIFE; WILL, 4.

MASTER AND SERVANT.

1. *Railroad.—Section Hand.—Special Service.—Injury by Wild Train.—Liability of Master.*—Where a railroad company orders a section hand to go to a designated place upon the road and there perform a special service, it is liable for an injury caused to him, without his fault, while proceeding to the designated place, by the hand-car upon which he is riding coming in collision, at a short curve, with a wild train of the running of which he is not notified, and of the approach of which no warning is given, the danger to which he is thus exposed not being one of the ordinary risks of the service which he assumes. *Cincinnati, etc., R. W. Co. v. Lang, 579*
2. *Same.—Rule Governing Employees.—Disobedience of Order.—When Master not Liable.*—But where the railroad company has adopted and promulgated a rule requiring section hands to be prepared at all times for special or irregular trains, and where the injury occurs at a place

beyond that to which the special order directed the employee to go, the company is not liable. *Ib.*

MEASURE OF DAMAGES.

See CHATTEL MORTGAGE, 6, 7; GUARDIAN AND WARD, 10; PARENT AND CHILD, 3.

MISTAKE.

See BENEFIT SOCIETY; GUARDIAN AND WARD, 7, 8; SHERIFF'S SALE, 1, 2; VERDICT, 2.

MORTGAGE.

See CHATTEL MORTGAGE; ESTOPPEL; REAL ESTATE, 6, 7; SCHOOL FUND MORTGAGE.

1. *Consideration.—Parol Proof.*—The consideration of a mortgage may be proved by parol, but it is not competent to contradict by parol the conveying part of such an instrument. *Murdock v. Cox, 266*
2. *Same.—For Support of Mortgagee.—Cancellation.*—Where, after partition of an intestate's property, the widow conveys to the heirs all of her interest in the land, and in consideration thereof and to better secure herself means of support during her life, requires each heir to execute to her a mortgage upon the land set apart to him, for a certain sum, with interest, "to be collected by her only," the mortgagors, upon showing a compliance with the mortgage during the mortgagee's lifetime, and a demand of the proper person after her death for its satisfaction, are entitled to have the mortgage cancelled. *Ib.*
3. *Representation of Title.—Estoppel.*—One who represents to a third person, upon inquiry, that he has sold certain land to another, who is in possession thereof, and that the latter has sufficient title to support a mortgage to secure money which he proposes to borrow from the inquirer, is estopped, in a suit to foreclose a mortgage taken in reliance upon his representations, to deny that the mortgagor had title. *Wisehart v. Hedrick, 341*
4. *Same.—Fraud.—Preconceived Design.*—An estoppel may arise where there is no preconceived design to deceive or mislead; the fraud consists in denying a representation upon which another has acted, and the repudiation of which will entail loss upon him. *Ib.*

MUNICIPAL CORPORATION.

See ASSESSMENT; CONSTITUTIONAL LAW, 4 to 6, 11, 12, 15, 18 to 21; DRAINAGE, 10; FERRIES; INTOXICATING LIQUOR, 1, 3 to 9; STREETS AND ALLEYS.

1. *Ordinance.—Regulation of Vehicles at Railroad Depot.*—A city has power to enact an ordinance authorizing police officers to prescribe the places where omnibuses, hacks and other vehicles shall stand at a railroad depot, and requiring drivers to obey the directions of such officers in regard to the places which their respective vehicles shall occupy. *Veneman v. Jones, 41*
2. *Same.—False Imprisonment.—Inducing Officer to Make Arrest.—Justification.*—Where the place assigned the owner of a vehicle is taken possession of by another person, who refuses to vacate it upon request, the former is justified in representing the facts to a police officer, and is not liable for inciting an arrest where the officer, upon the continued violation of the ordinance in his presence, arrests the offending party. *Ib.*
3. *Local Self-Government.—Right of the People.*—The right of the people to govern themselves, as to matters which are purely local, through

the medium of local municipal governments and officers chosen by themselves, was not surrendered upon the adoption of the Constitution, but is still vested in them, and it can not be taken away by the Legislature. *State, ex rel., v. Denny, 382*

4. *Same.—Cities.—Public Works.—Legislative Interference.—Invalid Act.*—The act of March 8th, 1889 (Acts of 1889, p. 247), assuming to give the exclusive control of streets, alleys, sewers, lights, water supply, etc., in cities of more than fifty thousand inhabitants, to boards of public works to be chosen by the Legislature from residents of the cities affected, is void, as denying the right of local self government. *Ib.*
5. *Cities and Towns.—Local Self-Government.—Legislature may not Take Away.*—The right of the inhabitants of cities and towns to control their local affairs can not be taken away by the Legislature, and the act of March 7th, 1889, placing the police and fire departments of certain cities, and the property connected therewith, together with the purchase of all supplies, etc., under the exclusive control of commissioners to be elected by the Legislature, is void, as being a denial of the right of local self-government. *City of Evansville v. State, ex rel., 426*
6. *Local Self-Government.—Appointment to Office.—Power of Legislature.*—The right of local self-government in towns and cities was not surrendered upon the adoption of the Constitution, but is still vested in the people of the respective municipalities, and the Legislature can not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and the duties of the officers. *State, ex rel., v. Denny, 449*
7. *Same.—Fire Department.—Local Control.—Legislative Interference.*—The right to provide and maintain a fire department in towns and cities is vested in the inhabitants of the respective municipalities, as an element of local self-government, and is not subject to legislative interference, except in so far as the General Assembly may prescribe rules to aid the people in the exercise of such right. *Ib.*
8. *Same.—Police and Fire Act of March 7th, 1889 —Invalidity of.*—The act of March 7th, 1889 (Acts of 1889, p. 222), creating a board of metropolitan police and fire department in cities having a certain population, providing for the election of the first commissioners by the Legislature, and giving them exclusive control of the police and fire departments of such cities and of matters connected therewith, is void, in so far as it relates to the fire department, as being in violation of the right of local self-government; and as the provisions of the act in relation to the police department are so connected with and dependent upon its other provisions as to be practically inseparable, the whole act falls. *Ib.*

NEGLIGENCE.

See MASTER AND SERVANT; RAILROAD, 1, 2, 4 to 9, 11, 16.

1. *When Actionable.*—A recovery can not be had for an injury which is the result of the joint or concurring negligence of both parties to the transaction. To charge the defendant with liability, the plaintiff must show that the injury was caused solely by the negligence of the defendant, or of persons for whose acts he is responsible. *Chicago, etc., R. W. Co. v. Hedges, 5*
2. *Criminal Responsibility.—Involuntary Manslaughter.—Railroad Engineer —Running Engine into Passenger Car.*—Where a railroad engineer, while engaged in operating the engine in his charge, carelessly and negligently runs the same into a passenger car standing upon the railroad track, thereby causing the destruction of the car and the death

of a passenger therein, he is guilty of the offence of involuntary manslaughter, as defined by section 1908, R. S. 1881. *State v. Dorsey*, 167

NEGOTIABLE INSTRUMENT.

See PROMISSORY NOTE.

NEW TRIAL.

See ARBITRATION AND AWARD; PRACTICE, 4; SUPREME COURT, 8; SURVEY; VERDICT, 2.

As of Right.—Bond.—Second Application.—Error Cured.—An error in granting a new trial as of right, without a bond being tendered and approved as required by section 1064, R. S. 1881, is cured by a second order granting a new trial upon a new application and a compliance with the statute, although the first order is not formally set aside.

Martin v. Martin, 227

NON EST FACTUM.

See BURDEN OF PROOF; PROMISSORY NOTE, 3.

NOTICE.

See ASSESSMENT; BENEFIT SOCIETY, 3; CHATTEL MORTGAGE, 1; COUNTY COMMISSIONERS, 3; DRAINAGE, 5 to 8; EXECUTION, 4; FRAUDULENT CONVEYANCE, 4; LANDLORD AND TENANT; PROMISSORY NOTE, 9, 10; SHERIFF'S SALE, 2, 6; TELEGRAPH, 5, 6, 8, 9.

OBSTRUCTION OF HIGHWAY.

See RAILROAD, 4 to 7.

OFFICE AND OFFICER.

See COMMISSIONERS OF SUPREME COURT; CONSTITUTIONAL LAW · GUARDIAN AND WARD, 3.

OFFICIAL BOND.

See CHATTEL MORTGAGE.

ORDINANCE.

See ASSESSMENT; FERRIES; INTOXICATING LIQUOR, 1, 5; MUNICIPAL CORPORATION, 1, 2; PLEADING, 3, 5, 6; RAILROAD, 16.

PARENT AND CHILD.

See WILL, 4 to 6.

1. *Contract of Third Person to Support Child.*—One who has contracted with the father of a minor child, for a stipulated money consideration, to keep the child in his family and in all respects to provide and care for her, is liable to the father, if, in violation of his contract, he causes her to be confined in the county poor-house, where she dies.
Vancleave v. Clark, 61
2. *Same.—Subsequent Insanity of Child.*—The fact that after the defendant had kept the child in his family for a time she became insane and difficult to control might have entitled him to a rescission of the contract, but it is not a defence to an action for a breach, it being his duty to prepare a suitable place to keep her. *Ib.*
3. *Same.—Breach of Contract.—Measure of Damages.*—The defendant having complied with his contract for a time, the plaintiff is not entitled to recover back the entire consideration paid, but the measure of damages is the difference in value between the care and treatment the child actually received and that called for by the contract. *Ib.*

PARTIES.

See DRAINAGE, 5, 6, 8; FRAUDULENT CONVEYANCE, 3; PROMISSORY NOTE, 2.

PARTNERSHIP.

See CONTRACT, 7; MALICIOUS PROSECUTION, 3, 4; PROMISSORY NOTE, 1.

1. *Agreement.—Limitation of Interest.—Rights of Third Persons.*—A partnership agreement, whereby the money and property used and accumulated in the course of the business of the firm belong exclusively to one partner, the other member to receive as compensation for his services a share of the profits merely, is not only valid between the partners, but is also binding upon persons who deal with the profit-sharing member, with knowledge of the facts. *Campbell v. Pence, 313*
2. *Same.—Township Trustee.—Settlement with Predecessor.—Receiving Check upon Funds of Third Person.—Liability.*—A township trustee who, upon a settlement with his predecessor in office, with knowledge of the facts, receives from him a check, drawn in the name of the latter's business partner, against a fund belonging to such partner, and which the drawer is authorized to use only for matters pertaining to the partnership business, is liable, in a suit brought against him in his individual capacity, to the owner of the fund for the amount so received. *Id.*

PATENT-RIGHT.

See PROMISSORY NOTE, 8.

PENALTY.

See GUARDIAN AND WARD, 7, 8, 10; TELEGRAPH; TELEPHONE, 5.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE.

PLEADING.

See CHATTEL MORTGAGE, 6; CONTRACT, 4, CRIMINAL LAW; DRAINAGE, 3, 9; GUARDIAN AND WARD, 5; JUDGMENT, 3; PRACTICE; PROMISSORY NOTE, 2; RAILROAD, 5, 6; SET-OFF; SLANDER, 2; STATUTE OF LIMITATIONS, 1 to 3; TELEGRAPH, 5.

1. *Ejectment.—Disclaimer.—Demurrer.*—A demurrer will not lie to a disclaimer of title in an action to recover possession of real estate. *McAdams v. Lotton, 1*
2. *Theory.*—A pleading must be good on the theory upon which it is drawn. *Hays v. Montgomery, 91*
3. *Complaint.—Ordinance.—Enactment.—Sufficiency of Allegation as to.*—An allegation in a complaint, that an ordinance was enacted by the board of trustees of the town, is sufficient, as the trustees alone are authorized to enact ordinances. *Vinson v. Town of Monticello, 103*
4. *Demurrer Addressed to Entire Pleading.—Effect of.*—Where a demurrer is addressed to an entire pleading, one paragraph of which is good, it is proper to overrule the demurrer. *Smail v. Sanders, 106*
5. *Ordinance.—Complaint Upon.*—In a complaint predicated upon a town ordinance, it is sufficient to aver that the ordinance was duly adopted by the board of trustees of the town, and to set out in or with the complaint so much of the ordinance as relates to the action. *Wagner v. Town of Garrett, 114*
6. *Same.—Sufficiency of Complaint.—Looking to Exhibited Ordinance.*—The ordinance violated gives the right of action, and is so far the foundation of the suit that a copy filed with the complaint will be looked to in considering whether a demurrer was correctly overruled, without other averment than that the ordinance "is attached to and made a part of the complaint." *Id.*

7. *Complaint.—Amendment of.*—An amended complaint has relation ordinarily to the date of the commencement of the action.
Chicago, etc., R. R. Co. v. Bills, 221
8. *Answer.—Denial.*—A paragraph of answer setting out facts which amount to a denial of the cause of action stated in the complaint, is good.
Martin v. Martin, 227
9. *Promissory Note.—Loss of.—Exhibit.*—Where a copy of a note sued on is filed with the complaint as an exhibit, no allegations in regard to the loss or destruction of the note are necessary to make the complaint good.
Cunningham v. Hoff, 263
10. *Complaint.—Attack after Verdict.*—If a complaint, consisting of two paragraphs, taken as an entirety, states a cause of action in all of the plaintiffs, it is good as against an attack after verdict, although each paragraph states a cause of action only in some, and not in all, of the plaintiffs.
Murdock v. Cox, 266
11. *Complaint.—Cross-Complaint.—General Rules.*—The general rules which govern a complaint also govern a cross complaint.
Johnson v. Pontious, 270
12. *Exhibit.—When Deemed Amended.*—Where an exhibit might have been amended in the trial court to conform it to the proof, it will be presumed, on appeal, that it was so amended. *Chaney v. State, ex rel., 494*
13. *Bill of Particulars.*—Where a bill of particulars is necessary to inform the adverse party of the nature of a claim set up in a pleading, the bill must be filed or the pleading will be bad on demurrer.
Peden v. Mail, 556
14. *Reply.—Demurrer to.—Form.*—A demurrer to a reply, assigning as cause that "the reply does not state facts sufficient to constitute a good reply to the defendant's answer to which it is directed," does not comply with the statute (section 357, R. S. 1881), and is bad. *Ib.*
15. *Complaint.—Arrest of Judgment.*—Where the complaint contains one good paragraph, a motion in arrest of judgment will not lie. *Ib.*
16. *Objection to Evidence.—Setting Aside Verdict.*—A party can not challenge the sufficiency of a pleading by objecting to evidence or by a motion to set set aside the verdict. *Ib.*
17. *Sufficiency of Complaint.*—A complaint which entitles the plaintiff to some relief is sufficient on demurrer. *Ib.*

POLICE AND FIRE PROTECTION.

See CONSTITUTIONAL LAW, 7 to 9, 11, 12, 19 to 21; MUNICIPAL CORPORATION, 5 to 8.

PRACTICE.

See BILL OF EXCEPTIONS; COSTS; CRIMINAL LAW; EVIDENCE, 8, 10; INSTRUCTIONS TO JURY; NEW TRIAL; PLEADING; PROMISSORY NOTE, 2; SUPREME COURT; TRIAL; VERDICT.

1. *Pleading.—Exhibit.—Part of Record.—Bill of Exceptions.*—Where a paper is properly a part of and is copied into the record as an exhibit filed with and as a part of a pleading, it need not be re-copied into the bill of exceptions, but it is sufficient to refer to it in the bill and state the fact that it was admitted in evidence and that a copy of it appears at a particular place in the record. *Henry v. Thomas, 23*
2. *Instructions.—Exclusion of Evidence.—Bill of Exceptions.*—No available error can be predicated upon the refusal to give instructions or the exclusion of evidence, unless all the evidence is brought into the record by a bill of exceptions, or unless the applicability of the instructions or the materiality of the evidence is otherwise properly shown.
Wallace v. Mattice, 59

3. *Exceptions.—When Must be Taken.*—In order to save any question for review in the Supreme Court, the exception to the decision of the lower court must be taken at the time the decision is made. If taken afterwards, it will not be considered on appeal. *Matsinger v. Fort*, 107
4. *Special Finding.—Conclusions of Law.—Failure to Except to.—Motion for New Trial.*—An assignment, as one of the grounds for a new trial, that the decision of the court is contrary to law, does not perform the office of an exception to the conclusions of law stated by the court on a special finding of facts, nor does such an assignment remedy the failure to except to the conclusions of law. *Bundy v. McClarnon*, 165

PRESUMPTION.

See DRAINAGE, 8, 9; JUDGMENT, 7; PLEADING, 12; PROMISSORY NOTE, 9; STREETS AND ALLEYS, 3.

PRINCIPAL AND AGENT.

See TELEGRAPH, 10.

PRINCIPAL AND SURETY.

See BANKS AND BANKING.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION, 5 to 9.

PROMISSORY NOTE.

See BANKS AND BANKING; BURDEN OF PROOF; DELIVERY; PLEADING, 9.

1. *Partnership.—Endorsement to One Partner.—Right of Action.*—One partner, during the continuance of the partnership, has implied authority to endorse notes payable to the firm, in the firm name, and if, by mutual agreement between the members, a note so payable is endorsed and sold to one of the partners, the latter becomes the owner thereof and may maintain a suit thereon in his own name.
Fulton v. Loughlin, 286
2. *Same.—Sufficiency of Endorsement.—Defect of Parties.—Demurrer.*—Where it is averred in a complaint upon a promissory note that the plaintiff is the owner of the note by endorsement from the payee, the sufficiency of the endorsement can only be tested by a demurrer assigning as cause that there is a defect of parties. *Ib.*
3. *Same.—Officers of Corporation.—Signing in Individual Capacity.—Non Est Factum.*—In an action on a promissory note, which is in form that of the makers and does not on its face purport to be the obligation of the corporation of which they are officers, if the defendants do not deny under oath that they executed it in the character in which they are sued, it is confessedly the paper of the makers. *Ib.*
4. *Same.—Debt of Third Person.—Consideration.*—A promissory note, negotiable according to the law merchant, is not void for want of a consideration if it be given for the antecedent debt of a third person and be made payable at a future day. *Ib.*
5. *Recital of Consideration.—Guaranty.*—An instrument in the ordinary form of a promissory note except that it contains the words "This note given to secure the payment of the Universalist Church debt," is a promissory note, and not a contract of guaranty, the words quoted being a mere recital of the consideration.
Clanin v. Esterly H. M. Co., 372
6. *Same.—Parol Agreement between Maker and Payee.*—In an action upon such note it is not admissible to aver and prove that the payee agreed, when he received the note, that he would procure another person to sign it, and that it should not become binding on the maker until

- so signed; nor is it competent to show that the payee agreed to collect subscriptions made by members of the church and apply the proceeds to the payment of the note, but had failed to do so. *Ib.*
7. *Same.—Escrow.*—A promissory note may be delivered as an escrow to a third person, but it can not be so delivered to the payee. *Ib.*
8. *Given for Patent-Right.—Violation of Statute.—Innocent Holder.*—A negotiable promissory note, fair upon its face, is valid in the hands of an innocent holder for value, although taken by the payee in violation of the statute regulating the sale of patent-rights.
Tescher v. Merea, 586
9. *Same.—Presumption of Holder's Good Faith.—What Circumstances will Overthrow.*—The circumstances which will overthrow the presumption that the purchaser of commercial paper acquired it in good faith, must be pointed and emphatic and lead directly and irresistibly to the conclusion that the purchaser had notice. *Ib.*
10. *Same.—Notice of Fraud.—Abstaining from Inquiry.*—The ultimate fact to be found is not whether the purchaser might have ascertained or could have known that the note was fraudulently obtained, but whether he in fact knew it, or acted in bad faith in abstaining from inquiry. *Ib.*
11. *Same.—"Usual Course of Business."—Meaning of Phrase.*—The phrase "in the usual course of business," is not confined to persons engaged habitually in banking or purchasing notes; but one who in good faith purchases a negotiable note before maturity, for value, or who takes it in payment of an antecedent debt, is not out of the usual course of business. *Ib.*
12. *Same.—Payable to Bearer.*—A note payable to the order of A. B. or bearer, is in legal effect the same as if payable simply to bearer, and the title passes to whomsoever becomes the lawful holder. *Ib.*

PUBLIC BUILDINGS.

See COUNTY COMMISSIONERS.

PUBLIC IMPROVEMENTS.

See DRAINAGE; GRAVEL ROAD; HIGHWAY; STREETS AND ALLEYS.

PUBLIC POLICY.

See CONTRACT, 3, 8.

PURCHASER PENDENTE LITE.

See DRAINAGE, 6 to 8.

QUIETING TITLE.

See REAL ESTATE; SCHOOL FUND MORTGAGE, 4; STATUTE OF LIMITATIONS, 4.

RAILROAD.

See MASTER AND SERVANT; NEGLIGENCE.

1. *Crossing.—Drifting Train.—Negligence.—Injury to Footman.*—Although a railroad company may be negligent in detaching an engine from the cars composing the train, and, by increasing its speed, widely separating it from the cars, which are allowed to run over a highway or street crossing without means of giving the statutory warning, yet if a pedestrian, who is familiar with the crossing and the habit of the company to so detach the engine, is run over and killed by the drifting train, in the daytime, when by looking or by heeding outcries he could have avoided injury, an action for damages will not lie.
Chicago, etc., R. W. Co. v. Hedges, 5
2. *Same.—Presumption of Negligence of Traveller.*—Where it is found that

the person killed could, by looking, have seen the approaching train in time to have avoided injury, and that there was nothing to prevent him, before reaching the track, from seeing the train when it was two hundred feet from the crossing, it will be presumed that he either did not look or that he deliberately took the risk of attempting to cross, notwithstanding the danger. *Ib.*

3. *Conductor.—Employment of Physician.—Ratification by Company.*—Where a conductor, claiming to act as the agent of the railroad company, employs a physician to render professional aid to a stranger injured by collision with his train, telling the physician that he will leave the injured person in his care for treatment, and for him to send his bill to the superintendent of the road, and the company is notified of the employment, and permits the physician to go on and render services thereunder, it thereby ratifies the conductor's act, and is liable for services rendered until the patient is convalescent.
Terre Haute, etc., R. R. Co. v. Stockwell, 98
4. *Obstruction of Highway.*—A railroad company which leaves its cars standing in a public highway is guilty of an unlawful obstruction thereof, under sections 1964 and 2170, R. S. 1881, notwithstanding it may leave a portion of the center of the roadway open for the passage of vehicles.
Pittsburgh, etc., R. R. Co. v. Killey, 152
5. *Same.—Car Standing in Highway.—Frightened Horse.—Personal Injury.—Complaint.*—In an action against a railroad company for damages, the complaint is sufficient, as against a demurrer, if it alleges that the plaintiff was injured by reason of her horse becoming frightened at a car negligently left standing in a public highway along which she was lawfully driving, without alleging that there was anything peculiar or unusual about the car likely to frighten horses.
Pittsburgh, etc., R. R. Co. v. Killey, 152
6. *Same.—Negligence of Employees.—Averment as to.*—A general allegation in the complaint that a car was negligently placed and allowed to remain in the highway by the employees of the defendant, is sufficient to charge the latter with negligence, without specifying the particular employees or pointing out their duties with respect to the moving of cars. *Ib.*
7. *Same.—Evidence.—Erroneous Admission.—When Party Estopped to Complain.*—Where the defendant, over the objection of the plaintiff, secures a ruling admitting testimony that horses had passed the obstruction in the highway without becoming frightened, it can not complain of the admission of testimony upon the same subject in rebuttal, even if such evidence is incompetent. *Ib.*
8. *Common Carrier.—Negligence.—Contract.—Consideration.*—The injury of property *in transitu* through the negligence of the carrier, is a sufficient consideration for an agreement on the part of the latter to pay the owner of the property a certain sum in settlement of damages.
Chicago, etc., R. R. Co. v. Katzenbach, 174
9. *Same.—Adjustment of Damages.—Right to Keep Injured Property.*—A railroad company has the right, in adjusting damages for injury to property caused by its negligence, to contract to keep the injured property and pay the owner its value. *Ib.*
10. *Same.—Bill of Lading.—Limitation of Liability.—Waiver.*—A stipulation in a bill of lading limiting the liability of the carrier to a certain sum, is waived where the latter, in adjusting the damages resulting from its negligence, agrees to take the injured property and pay the shipper a larger sum than that limited. *Ib.*
11. *Expulsion from Train.—Unnecessary Force.—Damages.—Negligence.—Evidence.*—In an action to recover damages for injuries sustained by being

ejected from a train with excessive force, there is no question of negligence or of contributory negligence in the case, and it is error to permit the plaintiff to prove that he was upon the train in pursuance of information given him by the defendant's ticket agent that the train would stop at the station where he wanted to alight.

Chicago, etc., R. R. Co. v. Bills, 221

12. *Same.—Right of Trespasser to Recover.*—Such an action is for an unlawful invasion of the plaintiff's right of personal security, and proceeds upon the correct assumption that he is entitled to recover for injuries sustained by being ejected from the train with needless violence, even though he was upon the train without right. *Ib.*
13. *Round-Trip Ticket.—Return Coupon.—Rights of Passenger as to.*—Where one, holding an unused round-trip ticket from W. to M., two stations upon the line of a railroad, enters upon a train at M., the return station, he is entitled to have the return part of such ticket, by whomsoever detached from the other part, accepted in payment for his transportation to W. *Chicago, etc., R. R. Co. v. Holdridge, 281*
14. *Same.—Expulsion from Train.—Liability of Company.*—If a conductor refuses to accept a return coupon from a passenger, upon the return journey, who detaches such coupon from the other part of the ticket in his presence and tenders the same to him, and requires the passenger to leave the train at the next station, in order to avoid forcible expulsion, he is guilty of an act of oppression for which the railroad company is liable. *Ib.*
15. *Same.—Damages.—What not Excessive.*—A passenger, who was entitled to be carried to his destination upon a ticket tendered by him but refused by the conductor, in pursuance of the commands of the latter left the train at the next station to avoid forcible expulsion, but he immediately boarded the train again, paid his fare from that station to his destination, and was duly carried there.
Held, that two hundred dollars damages are not excessive compensation for the feelings of humiliation and shame suffered by him. *Ib.*
16. *Street Crossing.—Failure to Close Gates or Give Warning.—Negligence.*—Where a railroad company, in pursuance of a city ordinance, has erected gates and stationed a watchman at a street crossing, a traveller who approaches the crossing and finds the gates open and receives no warning from the watchman, has a right to assume that there are no approaching trains, and if, acting upon this assumption, he enters upon the crossing and is instantly confronted by trains going in opposite directions, and in the confusion caused by the unexpected danger into which he is thus led is struck and killed, the railroad company is liable. *Pennsylvania Co. v. Stegemeier, 305*

RAPE.

See CRIMINAL LAW, 3, 4, 20.

RATIFICATION.

See GRAVEL ROAD, 2; RAILROAD, 3.

REAL ESTATE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; DAMAGES, 1, 2; ESTOPPEL; EVIDENCE, 9; FRAUD, 2, 3; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; MORTGAGE; SCHOOL FUND MORTGAGE; SHERIFF'S SALE; STATUTE OF LIMITATIONS, 4, SURVEY; TRIAL, 3.

1. *Parol Contract of Purchase.—Possession.—Quieting Title.—Complaint.—Motion in Arrest.*—A complaint to establish and quiet title alleged a parol contract of purchase and the payment of part of the consideration, and that the plaintiff "immediately upon said purchase en-

tered into possession of said real estate and has since kept in possession."

Held, that the complaint is sufficient, as against a motion in arrest of judgment, to show that possession was taken under and by virtue of the contract.

Hyneman v. Roberts, 137

2. *Ejectment.—Quieting Title.—Pleading and Proof.*—Where the plaintiff in an action of ejectment, or in a suit to quiet title, alleges a legal title, a recovery can not be had by proof of an equitable title.

Johnson v. Pontious, 270

3. *Same.—Statutory Provisions.*—All the provisions of the statute in regard to actions to recover possession of real estate apply to suits to quiet title.

Ib.

4. *Same.—Parol Contract of Purchase.—Equitable Title.*—To constitute an equitable title to real estate under a parol contract of purchase, the claimant must show that possession was taken under the contract, and that the purchase-money was paid.

Ib.

5. *Same.—Specific Performance.*—A parol contract for the sale of real estate, the specific performance of which a court of equity will enforce, must be one that is complete and definite, and it must be just and fair in all of its provisions.

Ib.

6. *Mortgage.—Foreclosure.—Sale.—Title of Purchaser Relates Back.*—The title acquired by a purchaser at a sale under a decree foreclosing a mortgage relates back to the date of the mortgage.

Bateman v. Miller, 345

7. *Same.—Ejectment.—Possession by Stranger.—Disclosure of Title.*—Where such a purchaser, in an action by him to recover possession against one who was not a party to the foreclosure suit, makes out, *prima facie*, a perfect title, the defendant, if he has any title, must disclose it.

Ib.

REAL ESTATE, ACTION TO RECOVER.

See HUSBAND AND WIFE, 2; LANDLORD AND TENANT; REAL ESTATE, 2, 3, 7; TRIAL, 3.

1. *Disclaimer.—Effect of.—Demurrer.*—Under section 1072, R. S. 1881, a disclaimer by the defendant will not bar an action to recover possession of real estate, nor defeat the plaintiff's right to actual damages; but as the disclaimer is a confession, and its office to save costs accruing subsequent to the judgment, a demurrer to it will not lie.

McAdams v. Lotton, 1

2. *Same.—Costs.—Ouster.*—If, in such a case, the defendant, in defiance of the judgment and in opposition to his disclaimer, refuses to yield possession and thus compels the plaintiff to take out a writ of ouster, he becomes liable for all costs.

Ib.

REASONABLE DOUBT.

See DAMAGES, 3; FRAUD, 1.

RECEIVER.

See BANKS AND BANKING, 2.

REDEMPTION FROM JUDICIAL SALE.

See SHERIFF'S SALE, 7.

REFORMATION OF INSTRUMENT.

See BENEFIT SOCIETY.

REFORMATION OF JUDGMENT.

See SHERIFF'S SALE, 3.

REPORTER OF SUPREME COURT.

Supreme Court.—Syllabi of Decisions.—Reporter's Duties.—Under the Constitution of this State the Legislature can not require the judges of the Supreme Court to discharge an essential duty of the reporter by the preparation of *syllabi* of decisions. *Ex Parte Griffiths, 83*

RESCISSION OF CONTRACT.

See PARENT AND CHILD, 2.

RES JUDICATA.

See JUDGMENT, 4, 6, 7; TAXES, 5.

REVENUE DEFICITS.

See STATE FINANCE.

REVIEW OF JUDGMENT.

See JUDGMENT, 1 to 3.

ROAD SUPERVISOR.

See HIGHWAY.

SALE.

See ADMINISTRATOR'S SALE; CHATTEL MORTGAGE; COUNTY COMMISSIONERS; REAL ESTATE; SCHOOL FUND MORTGAGE; SHERIFF'S SALE; TAXES, 4, 5.

SCHOOL FUND MORTGAGE.

1. *Sale.—Power of County Auditor.—Burden of Proof.*—The county auditor, in making a sale of land in satisfaction of a school fund mortgage, has no power to sell in any other mode than that prescribed by the statute, and the burden is upon one claiming title under such a sale to show that the statutory requirements have been strictly pursued. *Haynes v. Cox, 184*
2. *Same.—Selling Part of Mortgaged Land.—Statutory Requirements.*—Where the auditor, in selling less than the whole tract mortgaged, does not take the quantity sold out of the northwesterly corner of the tract, as required by the statute, but, on the contrary, takes it from another and entirely distinct portion thereof, he exceeds his power and the sale is invalid. *Ib.*
3. *Same.—Duty of Auditor.*—It is the duty of the auditor to offer the mortgaged premises in the manner prescribed by the statute; and, if, after offering it for sale in that manner, no one bids the amount due, he must bid the property in for the use of the fund secured by the mortgage. *Ib.*
4. *Same.—Quieting Title.—Tender.*—Where, in an action in the usual form to quiet title, the defendant sets up title in himself through a sale under a school fund mortgage, no question as to the failure of the plaintiff to tender to the defendant the amount due on the mortgage is presented, unless a failure to make a tender is averred in the answer. *Ib.*

SET-OFF.

May be Replied.—A set-off may be pleaded to a set-off. *Peden v. Mail, 556*

SHERIFF'S SALE.

See EXECUTION, 2.

1. *Mistake.—Sale of Wrong Land.—Trespass.—Waste.—Injunction.*—A purchaser at sheriff's sale of land sold by mistake acquires no title to the land intended to be sold and can convey none, and his grantee in taking possession thereof is a trespasser, and a subsequent purchaser

- from the judgment defendant may enjoin the commission of waste by him. *Clendening v. Ohl*, 45
2. *Same.—Notice of Mistake.—Fraudulent Conveyance.*—Neither the fact that the purchaser from the judgment defendant bought with notice of the judgment lien and of its satisfaction by mistake, nor the fact that the land was conveyed by such judgment defendant to defraud his creditors, will defeat the suit for an injunction. *Ib.*
 3. *Excessive Judgment.—Reformation After Sale.—Damages.—Implied Contract.*—Where a judgment creditor bids the full amount of his judgment and costs for land subject to the lien, pays the costs and receipts the sheriff for the remainder of his bid, and, after notice of the filing of a complaint to correct the judgment, demands and receives a sheriff's deed to the land and asserts title thereunder, the owner of the land, upon affirming the sale, may recover from him, as upon an implied contract, the difference between the amount of his bid and the amount of the judgment as corrected. *Mitchell v. Weaver*, 55
 4. *Sale in Solido.—Setting Aside.*—Where a sheriff sells land as an entirety, without offering it in parcels, in violation of a decree adjudging the land to be susceptible of division and ordering a certain part thereof to be first sold in satisfaction of the judgment, the sale is voidable, and may be set aside. *Meriwether v. Craig*, 301
 5. *Same.—Defects in Sale not Cured by Deed.*—The fact that the sheriff, in executing a deed to the purchaser, includes therein only that part of the real estate which the decree directed to be first sold, does not cure the irregularity in selling the property *in solido*. *Ib.*
 6. *Same.—Knowledge of Defects.—Waiver.*—The owner of real estate judicially sold, who does not obtain knowledge of irregularities in the sale until after a deed has been executed to the purchaser, may afterwards sue to set the sale aside, as he can not be presumed to have waived defects of which he had no knowledge. *Ib.*
 7. *Redemption by Heir.—Right of Creditor to Re-Sale.*—Where real estate sold on execution or decretal order is redeemed by an heir of the deceased judgment debtor, the sale is thereby vacated, under section 770, R. S. 1881, and the real estate again subject to sale to satisfy any unpaid balance of the judgment. *Green v. Stobo*, 332
 8. *Same.—Decedent's Estate.—Filing Claim Against.—Release of Lien.—Waiver.*—A judgment creditor, by filing a claim against the estate of the deceased debtor for the unpaid balance of his judgment and procuring it to be allowed, does not release his lien or waive his right to enforce the original judgment by a re-sale of land after the previous sale has been vacated by redemption. *Ib.*

SHORT-HAND REPORTER.

See EVIDENCE, 10.

SLANDER.

1. *Charging that One has Loathsome Disorder.*—It is actionable slander to maliciously speak and publish of another that he has contracted and is suffering from a loathsome disorder. *Monks v. Monks*, 238
2. *Pleading.—Harmless Error.*—Where no evidence is adduced tending to prove alleged slanderous words set out in a paragraph of complaint, an error in overruling a demurrer to such paragraph becomes harmless. *Casey v. Hulan*, 590
3. *Same.—Express Malice.—Exemplary Damages.*—Where, in an action for slander, express malice is proved, the jury may assess exemplary as well as compensatory damages. *Ib.*

4. *Same.—Evidence of Other Slanderous Words.*—Evidence of other or similar slanderous words, spoken at other times and places, is admissible to show that the words charged in the complaint were spoken with malice. *Ib.*
5. *Same.—When Express Malice Exists.*—Where the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations, there is express malice. *Ib.*

SPECIAL FINDING.

See PRACTICE, 4 · SUPREME COURT, 8.

SPECIAL PRIVILEGES.

See CONSTITUTIONAL LAW, 11, 21.

SPECIAL VERDICT.

See VERDICT.

SPECIFIC PERFORMANCE.

See REAL ESTATE, 5; STATUTE OF LIMITATIONS, 4.

STATE FINANCE.

1. *Act Authorizing Loan.—Constitutional Law.*—The act of March 11th, 1889 (Acts of 1889, p. 390), "authorizing the Governor, auditor and treasurer of State to make a loan for the purpose of carrying on the State government," does not violate section 5 of article 10 of the Constitution, and is a valid law. *Hovey v. Foster, 502*
2. *Same.—"Casual Deficits."—Meaning of Term.*—The term "To meet casual deficits in the revenue," as used in section 5 of article 10 of the Constitution, which specifies the contingencies when the Legislature may authorize a debt to be contracted on behalf of the State, means a deficit not designedly brought about, but one resulting from casual or occasional discrepancies between the revenues received and the amounts required to provide for the general welfare and carry on the State government in the ordinary way, which could not be foreseen and provided for without the accumulation of an unnecessary surplus in the treasury. *Ib.*
3. *Same.—Power of Legislature.—When its Action not Subject to Review.*—While the power of the Legislature to authorize a debt to be contracted on behalf of the State does not exist until a contingency contemplated by the Constitution arises, yet when such a contingency has in fact arisen, or when the Legislature, without any apparent purpose to evade the Constitution, determines that it has, its action is not subject to review or liable to be controlled by the judicial department, unless it is evident at first blush that the conditions justifying the exercise of the power did not exist. *Ib.*
4. *Same.—Deficit May be Anticipated.*—It is not necessary to the validity of an act authorizing the borrowing of money on behalf of the State that an actual deficit should exist at the time the act is passed, for a casual deficit, within the meaning of the constitutional provision, may be one that is anticipated and provided for, if it is foreseen that it must necessarily occur before other provisions for replenishing the public funds can be made available. *Ib.*
5. *Same.—Method of Providing for Deficit.—Legislative Discretion.*—It is a matter within the discretion of the Legislature as to what provision shall be made, whether by increasing the tax levy or by contracting a debt, in order to provide for an inevitable deficit. *Ib.*
6. *Same.—Title of Act.*—The fact that it is recited in the title of an act that the loan thereby authorized is for the purpose of carrying on the

State government, rather than to provide for a casual deficit, is immaterial. *Ib.*

STATUTE.

See CONSTITUTIONAL LAW, 7 to 10, 16, 17; INTOXICATING LIQUOR, 4.

Construction.—Prospective Operation.—Legislative Intention.—Unless a contrary intention clearly and strongly appears, and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would materially change existing rights. *Niklaus v. Conkling, 289*

STATUTE CONSTRUED.

See COMMISSIONERS OF SUPREME COURT, 6; CONSTITUTIONAL LAW, 6 to 8, 11, 12, 15, 20, 21; COUNTY COMMISSIONERS, 3; CRIMINAL LAW, 5, 15; DAMAGES, 2; DRAINAGE, 1, 2, 7; GRAVEL ROAD, 3; HIGHWAY; JUDGMENT, 8; NEGLIGENCE, 2; REAL ESTATE, ACTION TO RECOVER, 1; STATE FINANCE; STREETS AND ALLEYS, 7 to 9; SURVEY; TAXES, 4, 5; TELEPHONE, 3; TRIAL; WITNESS, 2.

STATUTE OF LIMITATIONS.

See GUARDIAN AND WARD, 2 to 4, 6.

1. *Pleading.—Amendment of Complaint.*—An amended complaint has relation ordinarily to the date of the commencement of the action, and is regarded as a matter occurring in the continuation of the original cause. *Chicago, etc., R. R. Co. v. Bills, 221*
2. *Same.*—Unless some new claim or title, not previously asserted, is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced. *Ib.*
3. *Same.—Action for Personal Injuries.*—Where a complaint seeking to recover for being wrongfully expelled from a train is filed within two years from the doing of the act complained of, an amended complaint, filed after that time, seeking to recover merely for being expelled from the train with unnecessary violence, is not barred. *Ib.*
4. *Real Estate.—Specific Performance of Contract.—Quieting Title.*—Under section 294, R. S. 1881, actions for the specific performance of a parol contract of purchase of real estate, and to quiet title to real estate alleged to have been held by a decedent in trust for the plaintiff, must be brought within fifteen years. *Martin v. Martin, 227*

STREETS AND ALLEYS.

See ASSESSMENT; CONSTITUTIONAL LAW, 6; RAILROAD, 16.

1. *Street Improvement.—Surplus Earth.*—The validity of a provision in an ordinance authorizing a street improvement that surplus earth accumulating in the course of the improvement shall belong to the contractor, can not, under section 3165, R. S. 1881, be questioned in a proceeding to enforce an assessment. *Jenkins v. Steller, 275*
2. *Same.—Estoppel.*—Where a common council acquires jurisdiction and makes a contract for a street improvement, a party benefited, who stands by, without objecting, until the work is completed, is liable for the amount assessed against him as benefits. *Ib.*
3. *Same.—Estimate.—Precept.—Presumption.*—In the absence of an answer showing that the improvement was not completed according to the contract, the court must presume that the city engineer, in reporting a final estimate, and the common council, in ordering a precept, did their duty. *Ib.*
4. *Same.—Affidavit for Precept.*—It constitutes no valid objection to the

- affidavit for a precept that it was signed and sworn to by only one of two contractors. *Ib.*
5. *Same.—Extension of Time for Completing Improvement.*—The time of the contractors for the completion of the work, as fixed in the contract, may be lawfully extended by a vote of the common council. *Ib.*
 6. *Same.—Amendment of Transcript or Precept.*—The circuit court has no authority to amend the transcript or precept, or to authorize an amendment thereof, but such amendments must be made by the order or with the consent of the common council, after which an amended transcript may be filed. *Ib.*
 7. *Street Improvement.—Assessment.—Construction of Statutes.*—Statutes conferring power upon municipalities to make assessments for street improvements must be strictly construed. *Niklaus v. Conkling, 289*
 8. *Same.—Quantity of Ground Affected by Assessment.*—The statute of 1881 (R. S. 1881, section 3163), authorizes cities to levy an assessment upon ground abutting on the improvement to a distance of fifty feet back from the front line, and no more can be affected. *Ib.*
 9. *Same.—Act of 1885 not Retrospective.*—The act of 1885 (Acts of 1885, p. 207), relating to street improvements, does not enlarge the lien of a contractor where the work was completed and a sale had upon a precept prior to the passage of such act. *Ib.*

SUPREME COURT.

See COMMISSIONERS OF SUPREME COURT; COURTS; PLEADING, 12;
PRACTICE, 3.

1. *Assignment of Errors.—Brief.—Waiver.*—Errors assigned by the appellant, but not discussed in the brief of his counsel, are waived. *Butt v. Butt, 31*
2. *Same.—Intermediate Errors.—When not Available for Reversal.*—Where the judgment is clearly right on the facts found, it will not be reversed on account of intermediate errors. *Ib.*
3. *Instructions to Jury.—Consideration of.*—Where all the instructions given by the court are not in the record, instructions refused will not be considered on appeal; but if an instruction given appears in the record it will be considered, if it is so erroneous that it could not be cured by the giving of other instructions. *Vancleave v. Clark, 61*
4. *Brief.—Waiver of Error.*—Error which is not discussed in the Supreme Court, in the brief of the party assigning it, is waived. *Engleman v. Arnold, 81*
5. *Judges.—Ministerial Duties.*—Judges can not be required by the Legislature to perform ministerial duties. *Ex Parte Griffiths, 83*
6. *Same.—Constitutional Duties.—Legislature May not Add to.*—The Legislature has no power to add to the duties which are devolved upon judges by the Constitution. *Ib.*
7. *Same.—Syllabi of Decisions.—Reporter's Duties.*—Under the Constitution of this State the Legislature can not require the judges of the Supreme Court to discharge an essential duty of the reporter by the preparation of syllabi of decisions. *Ib.*
8. *Special Finding.—Judgment upon.—New Trial.—Practice.*—Where the Supreme Court is satisfied from the record that it would work injustice to direct judgment upon a special finding of facts, it will remand the cause with instructions to grant a new trial. *Murdock v. Cox, 266*

SUPREME COURT REPORTS.

See REPORTER OF SUPREME COURT.

SURETY.

See BANKS AND BANKING.

SURVEY.

Title to Real Estate.—New Trial as of Right.—A survey had under the provisions of section 5955, R. S. 1881, does not determine the title to real estate, and a party is not entitled to a new trial as of right under section 1064, R. S. 1881. *Russell v. Senior, 520*

TAXES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; EVIDENCE, 9.

1. *Assessment.—Board of Equalization.—Power of to Make.*—Where the county board of equalization ordered certain railroad iron to be assessed for the purpose of taxation, ascertaining its value from the surveyor of customs in whose charge it was at the time, or from some other person not an officer of the railroad company, and the auditor, by direction of the board, made the entry on the assessor's roll, and afterwards entered it upon the treasurer's books, such an assessment is invalid, and does not create any lien on the property.
Evansville, etc., R. R. Co. v. Hays, 214
2. *Same.—Valid Assessment.—What Constitutes.*—To constitute a valid assessment it must be made by the proper officer. There must, at least, be some attempt toward an assessment, and a compliance with the law by some officer authorized to make the assessment. The county board had no such authority in this instance. *Ib.*
3. *Same.—Illegal Assessment.—Suit to Recover Taxes.*—Where there has been an illegal assessment, the county treasurer can not maintain an action to recover the taxes so illegally assessed. *Board, etc., v. Armstrong, 91 Ind. 528, and Durham v. Board, etc., 95 Ind. 182, distinguished. Ib.*
4. *Invalid Sale.—Reimbursement of Purchaser.—Governing Statute.*—A proceeding, brought after the tax law of 1881 went into force, by a purchaser at a city tax sale made under the law of 1872, wherein the plaintiff seeks to be reimbursed from the city treasury for the taxes paid by him, is governed by the law of 1881.
Millikan v. City of Lafayette, 323
5. *Same.—When Purchaser Entitled to Reimbursement.—Description of Land.—City.—Judgment.—Conclusiveness of.*—The right of a purchaser to be reimbursed from the public treasury for taxes paid by him, on account of uncertainty in the description of the land sold, only exists where the description is so indefinite as to fail to carry a lien; yet if the description is not of this character, but an action is brought by the owner of the land against the city treasurer and the purchaser, and defended by the city, wherein it is decreed that the purchaser acquired no lien, and his certificate is cancelled, and the plaintiff's title quieted, the city is concluded by the judgment, and the purchaser is then entitled to be reimbursed, under section 6487, R. S. 1881. *Ib.*

TAX SALE.

See TAXES, 4, 5.

TELEGRAPH.

1. *Transmission of Message.—Penalty.—Contract.*—A contract is essential to create a duty, and in order that one may recover the statutory penalty for a breach of duty in the transmission of a telegram, a valid contract must be shown, as the contract is the foundation of the action.
Western U. Tel. Co. v. Yopst, 248
2. *Same.—Transmission on Sunday.—Necessity.*—A contract by a telegraph company to transmit a message on Sunday is valid or invalid, owing to the reasonable necessity, or the want of it, for the transmission of

- the message on that day. For evidence held not sufficient to show a necessity, see opinion. *Ib.*
3. *Same.—Nature of Business.*—In determining whether an act is, or is not, one of necessity, it is proper to give just effect to the nature of the business in which the person who does it is engaged. *Ib.*
 4. *Same.—What Messages May be Sent.*—A telegraph company may not transact ordinary business on Sunday, but it may keep open its offices for the receipt and transmission of messages where a reasonable necessity exists, such as those designed to relieve suffering, avert harm or prevent serious loss. *Ib.*
 5. *Same.—Complaint.—Notice of Necessity.*—Where a complaint against a telegraph company to recover a statutory penalty shows that the contract was made on Sunday, the complaint is bad unless the contract is shown to be valid because of the existence of a necessity for the making of the contract on that day, and that the defendant knew of the necessity. *Ib.*
 6. *Same.—How Notice May be Shown.*—Where the contents of the telegram itself are not sufficient to charge the telegraph company with notice of the necessity for its transmission, the plaintiff must show knowledge by extrinsic facts. A message reading, "Bring forty dollars if you want record," does not show necessity. *Ib.*
 7. *Same.—Prepayment of Charges.*—Where the agent of a telegraph company declines to receive compensation for transmitting a message, and requests the sender to allow the expense to be paid by the receiver, the company can not escape liability on the ground that compensation was not prepaid. *Ib.*
 8. *Same.—Notice of Default.—Failure to Give.*—Where a contract is essential to the existence of a duty, and it contains a stipulation requiring the plaintiff to give a written notice of a default, the failure to give the notice will defeat an action to recover a penalty attached to a violation of the duty created by the contract. *Ib.*
 9. *Same.—When Notice or Demand not Necessary.*—A provision in a contract between a telegraph company and the sender of a message, that "the company will not be liable for damages in any case where the claim for damages is not presented in writing within sixty days after sending the message," applies only to cases where the message is sent, and if there is a failure to transmit, no written notice or demand is required to fix the company's liability. *Ib.*
 10. *Same.—Evidence.—Declarations of Agent.*—An objection to the admission of the declarations of an agent on the ground that "no other person can bind the company except the one with whom the business is transacted," presents no question as to the nature and scope of the agent's authority, and is not well taken as a general proposition. *Ib.*

TELEPHONE.

1. *Instrument of Commerce.—Common Carrier.*—The telephone is an instrument of commerce, and persons or corporations engaged in the general telephone business are common carriers of news.
Central U. Tel. Co. v. State, ex rel., 194; Central U. Tel. Co. v. Falley, 598
2. *Same.—Discrimination.—Mandamus.*—A person or corporation engaged in operating telephone lines, furnishing connections, facilities and service to business houses, persons and companies, can be compelled by mandate, on the petition of one discriminated against, to furnish to such a one the same service that it furnishes to others, independent of any statutory provision against discrimination. *Ib.*

3. *Same.—Character of Service.—Statutory Regulation.—Rental Charges.—Toll-Stations.*—A company doing a general telephone business in this State can not evade the acts of April 8th and April 13th, 1885 (Acts of 1885, pp. 151, 227), prescribing the duties of such companies and regulating the rental to be charged for the use of telephones, by ceasing to do a rental business and establishing public toll-stations, but under such acts any person, within the local limits of the business of such a company in a town or city, has the right to demand and receive a telephone with connections, facilities and service, at the rate per month fixed therein. *Ib.*
4. *Same.—Lines Extending into Other States.—Interstate Commerce.*—The acts of 1885, relating to telephone companies, apply merely to the service to be provided to persons within this State, and they are, therefore, not open to the objection that they are void as attempting to regulate interstate commerce, although the lines of a company doing business in this State may extend into other States. *Ib.*
5. *Same.—Violation of Statute.—Penalty.—Mandamus.*—The fact that the statute prescribes a penalty for the violation of its provisions, does not abridge the right of an aggrieved party to compel the telephone company, by mandamus, to furnish him with the service to which he is entitled. *Ib.*
6. *Same.—Municipal Service.—Extra-Territorial Lines.*—In an action by a resident of a city to compel a telephone company to furnish him with telephonic service within such city, an answer that the lines of the company extend outside of the State, and that by furnishing the plaintiff with an instrument and service he would be placed in communication with points outside of the State, is bad. *Ib.*

TENANTS BY ENTIRETIES.

See HUSBAND AND WIFE, 1.

TENDER.

See SCHOOL FUND MORTGAGE, 4.

TITLE.

See ESTOPPEL; REAL ESTATE; SURVEY.

TORT.

See DAMAGES, 1, 2; MALICIOUS PROSECUTION.

TOWN.

See CONSTITUTIONAL LAW; INTOXICATING LIQUOR, 1, 3 to 9; MUNICIPAL CORPORATION; PLEADING, 3, 5; STREETS AND ALLEYS.

TOWNSHIP TRUSTEE.

See PARTNERSHIP, 2.

TRADE-MARK.

1. *Injunction.—State Courts.—Jurisdiction of.*—The State courts have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. The act of Congress assuming to confer exclusive jurisdiction upon the Federal courts in trade-mark cases has been pronounced unconstitutional. *Smail v. Sanders, 105*
2. *Same.—When Injunction will Lie.*—An injunction will be awarded where there is a fraudulent purpose and a wrongful imitation of the name and label of a competitor. *Ib.*

TRESPASS.

See RAILROAD, 3, 11, 12; SHERIFF'S SALE, 1, 2.

TRIAL.

See ARBITRATION AND AWARD.

1. *Whether by Court or Jury.—How Determined.*—In determining whether a cause is triable by the court or by a jury, under the provisions of section 409, R. S. 1881, neither the prayer for relief nor the name given to the action by the pleader is controlling, but the court will look to the substantive facts pleaded. *Martin v. Martin, 227*
2. *Same.—Rule Stated.*—Where the cause of action is one that can only be enforced by invoking the equitable powers of the court, the right of trial by jury does not maintain; but if the cause of action does not depend on the equitable jurisdiction of the court, a trial by jury may be demanded. *Johnson v. Taylor, 106 Ind. 89, and Kitts v. Willson, 106 Ind. 147, modified. Ib.*
3. *Same.—Real Estate.—Action by Equitable Owner to Recover.—Ejectment.*—An action by a plaintiff who seeks to recover the possession of land as the equitable owner thereof, is of exclusive equitable jurisdiction, within the meaning of section 409, R. S. 1881, and triable by the court, but an ordinary action in ejectment is triable by jury. *Ib.*
4. *Same.—Mixed Actions.—Withdrawal of Cause from Jury.—Instruction to Find for Defendant.*—Where, in case of the joinder of law and equity causes of action, the issues in the former are submitted to a jury, it is the duty of the court, if there is a failure of proof on the part of the plaintiff, to either withdraw the case from the jury or instruct them to find for the defendant. *Ib.*

TRUST AND TRUSTEE.

See EVIDENCE, 9; STATUTE OF LIMITATIONS, 4.

TURNPIKE.

See GRAVEL ROAD.

VENDOR AND PURCHASER.

See DRAINAGE, 6 to 8; EXECUTION, 1 to 4; FRAUD, 2, 3; FRAUDULENT CONVEYANCE; REAL ESTATE.

VENUE.

See CHANGE OF VENUE.

VERDICT.

See EVIDENCE, 5; MALICIOUS PROSECUTION, 5.

1. *Special.—When Judgment Must be Rendered Upon.*—Where it appears by the answers of the jury to interrogatories that the facts, or some of them, essential to support the general verdict are in irreconcilable conflict with such verdict, the court must accept as true the facts specially found and render judgment accordingly. *Chicago, etc., R. W. Co. v. Hedges, 5*
2. *Interrogatories to Jury.—Mistake in Answer.—Correction of.—Affidavits of Jurors.—New Trial.*—The jury returned a general verdict for the defendant and also returned answers to interrogatories propounded to them. The plaintiff moved for judgment on the interrogatories and answers. The defendant moved to correct the answer to an interrogatory by striking out the word "yes" and inserting the word "no," and filed affidavits of all the jurors that the answer agreed upon was "no," but that by inadvertence "yes" had been written. The motion to correct was overruled and judgment rendered for the plaintiff on the special verdict, the answers as returned being inconsistent with the general verdict. A motion for a new trial was denied.

Held, that affidavits of jurors will not be received to impeach their verdict, and that the trial court ruled correctly. ELLIOTT, C. J., dissents, on the ground that, with the general verdict in his favor, the defendant should have been awarded a new trial.

McKinley v. First National Bank, 375

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WAIVER.

See CRIMINAL LAW, 1; RAILROAD, 10; SHERIFF'S SALE, 6, 8; SUPREME COURT, 1, 4.

WAREHOUSEMAN.

1. *Warehouse Receipts.—Endorsee for Value.—Liability of Warehousemen to.*—Where warehouse receipts were issued, providing that the property described therein should be delivered only on return of the certificates properly endorsed, and the warehousemen delivered the property without the return of the warehouse receipts, they are liable to an endorsee of the warehouse receipts who in good faith loaned money upon them. They will not be heard to dispute the endorsee's title, nor to aver that they did not receive the property on the terms specified in the receipts. *Babcock v. People's Savings Bank*, 212
2. *Same.—What They Represent as True.—Innocent Parties.—Reliance on Representations.*—The warehouse receipts issued by the appellants represent as true two very essential things: 1. That the warehousemen received the property mentioned in the receipts as warehousemen. 2. That the property will be delivered only on the return of the certificates, properly endorsed. The warehousemen, and not an innocent third party who has relied on their representations, must bear the loss. *Ib.*
3. *Same.—Representations.—Withdrawal of.—When Can Not be Done.*—It is a general rule that one who makes representations can not withdraw or deny them to the prejudice of a third person who has acted upon them in good faith, even though there is no preconceived design to defraud. *Ib.*

WAREHOUSE RECEIPTS.

See WAREHOUSEMAN.

WASTE.

See SHERIFF'S SALE, 1, 2.

WATERCOURSE.

Obstruction of.—Instructions.—As to what constitutes a running stream or watercourse, for the obstruction of which an action will lie, see instructions set forth in opinion. *Robinson v. Shanks*, 125

WIDOW.

See HUSBAND AND WIFE, 4.

WILL.

1. *Construction of.*—Courts, in construing wills, will give due regard to the natural impulses and feelings of mankind, and take into consideration the general laws of descent and the rules for the disposition of estates, and beneficiaries will be held to take *per stirpes* unless the language used in the devise or bequest excludes such an intention.

Henry v. Thomas, 23

2. *Same.—When Devisees Take Per Stirpes.*—A testatrix provided by her will that her property should “be divided equally between my brothers and sisters, and the children of deceased brothers and sisters, and the brothers and sisters of Perry J. Brinegar (her deceased husband), and the children of deceased brothers and sisters.”
Held, that the children of deceased brothers and sisters of the testatrix and of her deceased husband take *per stirpes*, and are not entitled to share *per capita* with the living brothers and sisters. *Ib.*
3. *Same.—Phrase “to be Divided Equally.”—Meaning of.*—The words “to be divided equally” apply as well to a division among classes as among individuals. *Ib.*
4. *Legacy.—Specific and Demonstrative.—Ademption.—Married Woman.*—A father executed a will devising his homestead farm to two of his sons. To his four other children he bequeathed five hundred dollars each, to be paid in cash and to be in full of their interests in the homestead farm. The will contained a recital that the devises and bequests thus made were to be considered as a disposition of the homestead farm among the testator’s children, and were not to affect any other interest or estate. Afterwards, and during the testator’s lifetime, the devisees of the homestead farm furnished their father two thousand dollars, out of which he paid each of the four legatees five hundred dollars, and received from each a receipt, as follows: “Received from William B. Eldridge \$500, in consideration of my interest in his homestead farm, corresponding with his last will.” At the death of the testator the homestead farm and personal property worth five hundred dollars constituted his entire estate.
Held, that the legacies were neither specific nor demonstrative, and that they were adeemed and satisfied by the payments made in the manner disclosed.
Held, also, that money paid to a married woman, in ademption of a legacy, produces the same legal result as if she were unmarried.
Roquet v. Eldridge, 147
5. *Same.—What Constitutes an Ademption.*—An ademption results where a parent, or other person standing *in loco parentis*, after having made a bequest, gives a portion to the child to whom the bequest is made equal to or in excess of the amount bequeathed, the portion given and the legacy being *ejusdem generis*. *Ib.*
6. *Same.—Ademption of Specific or Demonstrative Legacies.*—Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed. *Ib.*

WITNESS.

See CRIMINAL LAW, 3, 7, 8, 13 to 17, 20 ; DEPOSITION.

1. *Action Between Heirs.*—In an action between a brother and sister relative to the title to land which both claim through their deceased father, a brother of the claimants and his wife, who are parties to the action but not to the issues, and disclaim any interest in the subject-matter of the controversy, are competent witnesses.
Martin v. Martin, 227
2. *Same.—Competency under Section 500, R. S. 1881.*—Where, in an action between heirs, a witness is called by one party, who testifies as to a conversation, relating to the matters in controversy, had by him with the opposite party, prior to the decedent’s death and in his absence, such opposite party becomes a competent witness, under section 500, R. S. 1881, in response to such testimony, but his right to testify is limited to the conversation in question. *Ib.*

WORDS AND PHRASES.

See CONTRACT, 5; PROMISSORY NOTE, 11; STATE FINANCE, 2; WILL, 3.

WORK OF NECESSITY.

See TELEGRAPH.

WRITTEN INSTRUMENT.

See DELIVERY.

END OF VOLUME 118.

HARVARD LAW